In The

Supreme Court of the United States

October Term, 1974

No. 74-896

Burlington Northern Inc.,

Petitioner,

v.

The American Railway Supervisors Association; National Mediation Board, an Agency of the United States of America; and George S. Ives, David H. Stowe, and Peter C. Benedict, Members of the National Mediation Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, an Agency of the United States of America; and GEORGE S. IVES, DAVID H. STOWE, and PETER C. BENEDICT, Members of the National Mediation Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 17, 1974.

OPINIONS BELOW

The opinion of the court of appeals, App. B, *infra*, is reported at 503 F.2d 58. The opinions of the United States District Court for the Northern District of

Illinois, Apps. E and F, *infra*, are reported at 350 F. Supp. 897 and 359 F. Supp. 1047.

JURISDICTION

The judgment of the court of appeals, App. C, *infra*, was entered September 17, 1974. A timely petition for rehearing *en banc* was denied October 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2 Fourth of the Railway Labor Act permits a railroad, after a merger, to recognize and bargain with representational units that are not carrier-wide craft or class units.

2. Even if the Railway Labor Act does so permit, whether a court has jurisdiction to interpret and apply a railway labor merger protection agreement so as to require a railroad to recognize and bargain with a less than carrier-wide representational unit after a merger.

STATUTES INVOLVED

The statutory provision principally involved is the second sentence of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152 Fourth, which reads as follows:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Section 2 Fourth is set forth in its entirety in App. A, *infra*, along with other statutes involved in this case: Sections 2 Third, 2 Eighth, 2 Ninth, and 2 Tenth and 3 First (i) and 3 Second of the Railway Labor Act, 45 U.S.C. §§ 152 Third, Eighth, Ninth, Tenth, 153 First

(i), Second; Sections 9(a) and 9(c)(1)(B) of the Labor Management Relations Act, 29 U.S.C. §§ 159(a), 159(c)(1)(B); and Sections 5(2)(f) and 5(11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(f), 5(11).

STATEMENT OF FACTS

This case concerns the effects of a railroad merger on employee representation. The case arises from the Burlington Northern merger. The Burlington Northern was formed in March 1970 by the merger of four railroads—the Great Northern Railway; the Chicago, Quincy & Burlington Railroad ("CB&Q"); the Northern Pacific Railway; and the Pacific Coast Railroad—and the lease by the merged company of a fifth railroad, the Spokane, Portland & Seattle Railway ("SP&S"). (App. B, p. 13a, *infra.*)

Prior to the merger, the American Railway Supervisors Association ("ARSA") represented the craft or class of technicians employed by the Great Northern. ARSA had been certified as the representative of these employees by the National Mediation Board ("NMB") in December 1960. The technicians on lines other than Great Northern were not represented by any labor organization. ARSA also represented the craft or class of mechanical supervisors on the CB&Q, having received such certification in August 1944.[1] Mechanical supervisors were represented by other labor organizations on two of the other merging lines (Great Northern and SP&S) and were unrepresented on another (Northern

[1] Thus, in the case of both the technicians and the mechanical supervisors, the two-year period during which such certifications are conclusive, 29 C.F.R. § 1206.4(a), had expired years before the merger. The corresponding period under the Labor Management Relations Act is one year. See *Brooks* v. *Labor Board*, 348 U.S. 96 (1954).

Pacific). (App. B, pp. 13a, 14a; E, p. 26a, n. 3, *infra*; J.A. 5, 16; DeButts Aff. 5.[2])

In 1967, while the merger was still in the proposal stage, the merging railroads entered into merger protection agreements with unions that represented engineers and trainmen, providing "attrition protection" against loss of employment except "by death, retirement, discharge for cause, or resignation." 331 I.C.C. 228, 277 at n. 18. The I.C.C. approved the proposed merger, in a decision that said nothing about representation or bargaining units after the merger, on the condition that the merged railroad provide similar "attrition protection" against loss of employment for other employees.[3] *Great Northern Pac. & B. Lines Merger*, 331 I.C.C. 228, 276-279, 359-360 (1967), *aff'd, United States* v. *United States*, 296 F. Supp. 853 (D.D.C., 1968), *aff'd, Northern Lines Merger Cases*, 396 U.S. 491 (1970). The merging railroads then entered into agreements with a number of additional unions providing attrition protection. One of these was an agreement executed in January 1968 by the five merging railroads and six unions including ARSA. In addition to the attrition protection provisions, Section 8 of that agreement provided that the new merged company would assume collective bargaining

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[2] The Joint Appendix in the court below is cited herein as "J.A." The Affidavit of Thomas C. DeButts in Opposition to Defendants' Motions for Summary Judgment, filed May 31, 1972, is cited herein as "DeButts Aff." Other documents in the record referred to herein include the Deposition of Paul Portsche, Jr., Feb. 18, 1972, cited as "Portsche Dep."; the Deposition of Edward J. Hickey, Jr., Jan. 18, 1972, cited as "Hickey Dep."; Affidavits of Thomas A. Tracy, Executive Secretary, NMB, dated May 4 and June 9, 1972, cited as "Tracy Aff." (with date); Affidavit of Thomas C. DeButts in Response to Affidavit of J. R. Tipton, filed May 14, 1973, cited as "2d DeButts Aff."

[3] The labor protection provisions in the I.C.C. decision approving the Burlington Northern merger are set forth in App. G, *infra*.

agreements "concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto" in effect at the time of the merger, "subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto" (App. O, p. 93a, *infra*).[4] Section 9 of the agreement provided for arbitration of "any dispute or controversy . . . *with respect to the interpretation or application of any provision of this Agreement*" (App. O, p. 93a, *infra*). (Emphasis added.)[5] The agreement was silent as to bargaining units and as to the representation of employees after the merger.

On March 2, 1970, the merger was effected. On that date, the merging carriers ceased to exist as separate carriers and merged and integrated their operations. The new railroad was operated thereafter as a single railroad under a single management, reporting to the I.C.C. as a single carrier. The employees of the merging carriers became employees of the new railroad and were intermingled, particularly in the case of technicians. Consequently, in management's view it is no longer possible to identify particular employees, especially technicians, as "*the* employees" on "*the* segment" formerly operated by the CB&Q or by the Great Northern. (App. E, p. 26a, *infra*; see J.A. 108-109, 114; Portsche Dep. 45-46.)[6]

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[4] Under the Act, changes in "rates of pay, rules, and working conditions" must be established through collective bargaining with the employees' representatives (45 U.S.C. §§ 152 First, 156); if employees are not represented, however, collective bargaining over such changes is not required. See *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 336-337 (1944); *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 347 (1944).

[5] Sections 8 and 9 of the merger protection agreement are set out in full in App. O, *infra*.

[6] The Great Northern technicians, represented up to that time by ARSA, constituted a little less than 40 percent of the entire craft

Shortly before the merger, the Great Northern Railway Company Technical Employees Association ("GNRCTEA"), a rival of ARSA, had petitioned the NMB for certification as the representative of the Great Northern technicians. At the time of the merger, the NMB had not yet conducted an election to determine whether ARSA or GNRCTEA had the support of a majority of the members of the unit, but only 25 of the 105 technicians employed by the Great Northern still belonged to ARSA. (App. I, p. 52a, *infra*; J.A. 100-102.) On June 3, 1970, three months after the merger, the NMB dismissed GNRCTEA's application without conducting an election, holding that the merger mooted that application. The NMB stated:

> "The Board finds that since the carrier known as the Great Northern Railway Company is no longer in existence, the application as presented is moot." (App. I, p. 53a, *infra.*)

Following the NMB ruling, ARSA inquired whether the ruling "infer[s] that the [ARSA] is no longer certified" (J.A. 98). The Executive Secretary of the NMB replied that while the ruling did "not nullify any representation rights arising out" of ARSA's 1960 certification (J.A. 99), the "dismissal notice should not be construed as a determination as to the representation rights of any employee" (J.A. 99).

That obscure response left Burlington Northern confronted with this situation: Under Section 2 Fourth of the Railway Labor Act "a majority of a craft or class of employees" has a right to determine who shall be the representative of the group and also has the right to determine that the group shall not be represented.

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or class of technicians on the new merged railroad as a whole, and the mechanical supervisors on the CB&Q, represented up to that time by ARSA, constituted an even smaller percentage of the entire craft or class of mechanical supervisors on the merged railroad. (App. E, pp. 26a, n.3, 27a, n.4, *infra.*)

Railway Clerks v. *Employees Ass'n*, 380 U.S. 650, 670 (1965). Burlington Northern had a duty to bargain with the "true representative of [its] employees" and a negative duty *not* to bargain "with any who do not represent them." *Virginian Ry.* v. *Federation*, 300 U.S. 515, 548 (1937). To determine with whom Burlington Northern should and should *not* bargain—ARSA, GNRCTEA, or no union at all—it was necessary to determine the scope of the relevant bargaining unit. If the unit was carrier-wide in scope, Burlington Northern apparently had a duty not to bargain with ARSA as the collective bargaining representative of any of its technicians, because prior to the merger a majority of *all* its technicians had preferred not to be represented. To do otherwise would have given ARSA unlawful support and would have unlawfully interfered with the employees' rights to choose their own representation[7]—violations of Sections 2 Third and 2 Fourth of the Act,[8] which are subject to criminal penalties[9] and could conceivably give rise to assertions of liability for damages.[10] On the other hand, if the former Great Northern technicians' unit survived the merger, Burlington Northern was confronted with conflicting claims by the two labor organizations, neither of which had ever been certified on the Burlington Northern, and neither of which had been recently certified on the Great Northern. If Burlington Northern had continued to deal with ARSA as the representative of the former Great Northern technicians' unit after the NMB had determined that the merger had mooted the controversy over representation of that unit, it would have

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[7] See *Linden Lumber Division* v. *N.L.R.B.*, 43 L.W. 4097, 4101 n.3 (Dec. 23, 1974) (dissenting opinion); *Radio Officers* v. *Labor Board*, 347 U.S. 17 (1954).

[8] 45 U.S.C. §§ 152 Third, Fourth, App. A, pp. 1a-2a, *infra*.

[9] 45 U.S.C. § 152 Tenth, App. A, pp. 3a-4a, *infra*.

[10] Compare ARSA Counterclaim, J.A. 42 ($1 million).

exposed itself to serious claims of unlawful interference by adherents of GNRCTEA. The railroad faced similar problems with respect to mechanical supervisors.

Burlington Northern had no way in which to resolve this dilemma. For although the NMB has jurisdiction under Section 2 Ninth of the Railway Labor Act [11] to determine representation and bargaining unit issues, it will not entertain *employer* petitions for a determination of such issues. NMB, 38th Ann. Rep. 30 (1973); *Railway Clerks* v. *Employees Ass'n*, 380 U.S. 650, 666 (1965).[12] Therefore, Burlington Northern could not petition the NMB for a determination of ARSA's representative status and accordingly had to make its own best guess about the matter. The most reasonable view appeared to it to be that the railroad had a duty not to bargain with ARSA over employees' rates of pay and working conditions because ARSA did not claim the support of a majority of any craft or class of the railroad's employees. Accordingly, after the NMB ruling, Burlington Northern stopped treating ARSA as the collective bargaining representative of any of its technicians or mechanical supervisors [13] "until and unless" it obtained a

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[11] 45 U.S.C. § 152 Ninth, App. A, pp. 2a-3a, *infra*.

[12] In this respect, NMB procedures differ markedly from those of the NLRB under the LMRA, which this Court considered last month in the *Linden Lumber* case. *Linden Lumber Division* v. *N.L.R.B.*, 43 L.W. 4097 (Dec. 23, 1974).

[13] Burlington Northern had continued briefly to deal with ARSA after the merger. It negotiated agreements disposing of pending proposals to increase the pay of mechanical supervisors on the CB&Q and to establish a dues checkoff. The agreements were dated as of the day before the effective date of the merger, and (as is generally true of railway labor agreements) included no termination date. (App. B, p. 13a, *infra*; Portsche Dep. Exs. 1, 2.) In addition, Burlington Northern has continued to handle grievances with anyone (including ARSA) desired by the employee whose grievance is involved, in accordance with the Railway Labor Act rule that grievance representation is an individual matter, not a unit matter. (App. B, p. 13a, *infra*; see *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 741 (1943).)

current NMB certification, pursuant to Section 2 Ninth of the Act,[14] as the representative of any employees it claimed to represent. (App. B, p. 15a, E, p. 28a, *infra*; J.A. 32; Portsche Dep. Ex. 8.)

Instead of seeking such certification, however, ARSA sought arbitration under Section 9 of the six-union merger protection agreement of January 1968, described above. The issue tendered by ARSA for such arbitration was whether Section 8 of the merger protection agreement required Burlington Northern "to take over and assume the collective bargaining agreements" between ARSA and the Great Northern and CB&Q, "including the continuing right thereunder of the [ARSA] to act as the representative of the employees covered by said agreements." (App. B, p. 16a, *infra*.) Burlington Northern was of the view that ARSA's "interpretation" of Section 8 was insupportable;[15] and that if the agreement were construed in accordance with ARSA's demands, the agreement would be invalid, since Section 2 Fourth of the Railway Labor Act restricts representational units for collective bargaining purposes to carrier-wide craft or class units, ARSA lacked majority support of the employees in any such carrier-wide unit, and no agreement could lawfully provide otherwise. To avoid a claim that the railroad's agreement to ARSA's arbitration demand would constitute a concession as to the validity of the agreement so construed, Burlington Northern proposed that the parties agree to arbitration in a format that would not prejudice either party's position on such issues. (ARSA Answer and Counterclaim, Ex. 5.) ARSA rejected Burlington Northern's arbitration proposal and requested the NMB to name an arbitrator to determine the issue, framed as

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[14] Section 2 Ninth of the Act provides that the NMB shall determine disputes among employees "as to who are the representatives of such employees." App. A, p. 2a, *infra*.

[15] See note 32, p. 23, *infra*.

ARSA had framed it, under Section 9 of the merger protection agreement. (*Id.*, Ex. 6, 7.) The NMB advised the parties that it had docketed the dispute as "Special Board of Adjustment No. 775" (Tracy Aff., May 4, 1972, Attachment G), a designation used by the NMB when it appoints an arbitrator at the request of a party to decide a dispute over contract interpretation (NMB, 38th Ann. Rep. 44-45).[16]

Burlington Northern then instituted this litigation in the Northern District of Illinois, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337. It claimed that it is not required to treat ARSA as the collective bargaining representative of any of its employees, and that the issue which ARSA had tendered for arbitration under Section 9 of the merger protection agreement was not so arbitrable, because the interpretation sought by ARSA, if accepted, would render the agreement unlawful and invalid as conflicting with the Railway Labor Act[17] (App. F, pp. 40a-41a, *infra*). ARSA counterclaimed, seeking to compel arbitration under Section 9 on the issue it had tendered, and claiming

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[16] The NMB's role in appointing an arbitrator to a "special board of adjustment" to decide a dispute between a railroad and a union over contract interpretation—a so-called "minor" dispute subject to Section 3 of the Railway Labor Act (see App. A, pp. 4a-7a, *infra*; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945))—is quite different from its role as the body designated by Section 2 Ninth of the Railway Labor Act to determine the preferences of employees as to their representation (See NMB, 38th Ann. Rep. 4-8, 20-23, 29-33, 42-57.) Instead of requesting the NMB to act in the latter role, as Burlington Northern had suggested, ARSA asked the NMB to act in the former role.

[17] Questions as to the *validity* of railway labor agreements—rather than their "interpretation or application"—have been held to be for the courts, not arbitrators, in Railway Labor Act cases. See *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327-328 n. 3 (1959); *McElroy* v. *Terminal Railroad Association*, 392 F.2d 966, 970 (7th Cir., 1968) ("the Supreme Court has decided that contract validity questions are for the courts and not for the Adjustment Board").

$1 million in damages and attorneys' fees for Burlington Northern's withdrawal of recognition (App. F, pp. 41a-42a, *infra*).

On cross-motions for summary judgment, the district court dismissed both the claim and the counterclaim for want of jurisdiction. It held that the determination and certification of the proper bargaining representative of employees are within the exclusive jurisdiction of the NMB acting in its role under Section 2 Ninth of the Railway Labor Act. ARSA appealed, and the railroad cross-appealed.

In the meantime, ARSA *had* applied to the NMB under Section 2 Ninth to investigate and determine the representation of mechanical supervisors employed by Burlington Northern (2d DeButts Aff. 5). On September 19, 1973, after the appeals in this case had been docketed in the court of appeals, the NMB ruled on the ARSA application. It ruled that "a dispute existed among the employees concerned" and that "no certified bargaining agent represented these employees," and it determined the representation issue by conducting an election in which all members of the craft or class of mechanical supervisors on the entire railroad were allowed to vote. On the basis of the vote, the Board determined that a majority of the unit desired *no* representation,[18] and it therefore dismissed the application. (App. H, *infra*.)[19]

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[18] Under NMB procedures, employees who prefer not to be represented by any union are required to register that preference by not voting. *Railway Clerks* v. *Employees' Ass'n*, 380 U.S. 650, 670 (1965). Out of 569 eligible employees—all the members of the craft or class of mechanical supervisors employeed by Burlington Northern as a whole—only 153 cast ballots, of which 139 were cast for ARSA. (App. H, *infra*.) Thus the overwhelming majority of the employees in the craft or class chose not to vote.

[19] The NMB order was not, of course, a part of the record in the district court because the NMB made the order after this case was docketed in the court of appeals. All other documents reproduced in the Appendix to this Petition, except the opinions and orders of the court of appeals, were before the district court.

On September 17, 1974, the Court of Appeals for the Seventh Circuit decided this case. It first reversed the district court's holding that the issue was essentially a representation issue within the NMB's exclusive jurisdiction under Section 2 Ninth of the Act and therefore outside the court's jurisdiction. The court of appeals held that it had jurisdiction to determine the parties' dispute because "the issue before the court in this case, the effect of the pre-merger agreement between the two parties to this action, is a common-law contract determination within the province of the federal courts and is not reserved to the exclusive jurisdiction of the NMB." (App. B, p. 17a, *infra.*)

The court then turned to the merits. Burlington Northern had argued that Section 2 Fourth of the Railway Labor Act does not permit a carrier to recognize a unit that is less than a carrier-wide craft or class unit, and that since ARSA admittedly did not represent a majority of the carrier-wide craft or class of either technicians or mechanical supervisors, Burlington Northern was prohibited by the Act from treating ARSA as the representative of those employees. The court rejected that argument, holding that, as it interpreted and applied Section 8 of the merger protection agreement, Burlington Northern had agreed therein to recognize "the labor organizations signatory to the agreement including ARSA," and that Section 8 was a "voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide." (App. B, pp. 18a, 19a, *infra.*) The court brushed aside the railroad's contention that if the merger protection agreement were so interpreted, it would be in conflict with Section 2 Fourth of the Act and therefore unlawful. The court stated that the agreement was

> "not inconsistent with any provision of the Railway Labor Act, and if it were its provisions would be

> controlling . . . ; it was entered into by the parties to this case in contemplation of the merger and the conditions that would exist after the merger; and there is no reason it should not be given full force and effect." (App. B, p. 18a, *infra.*)

Thus, the court concluded, Burlington Northern had refused to "honor its obligations under the Employees Merger Protection Agreement" and was therefore in "breach." (App. B, p. 20a, *infra.*)

The court held that the NMB's ruling of September 1973 concerning the vote by the entire craft or class of mechanical supervisors (see p. 11, *supra*) was immaterial to the case before it. That ruling, the court stated, "could not justify or cure plaintiff's breach" of the merger protection agreement, and that "the failure of ARSA to gain system-wide representation in an election it had requested itself did not affect its certification [which is now 30 years old] as representative of the mechanical supervisors on the CB&Q segment of the merged railroad." (App. B, p. 20a, *infra.*)

Having itself undertaken to interpret and apply Section 8 of the merger protection agreement so as to require Burlington Northern to recognize and bargain with ARSA, and having held that agreement lawful, the court of appeals nevertheless then went on to hold that Section 9 of the agreement, providing for arbitration, must also be followed. It sent the case back to the district court "with directions that Burlington Northern be ordered to arbitrate its disagreement with ARSA [over Section 8], as provided in Section 9 of the Employees Merger Protection Agreement." (App. B, p. 20a, *infra.*) The court did not, however, identify what issues its own interpretation of Section 8 left open. In addition, it directed the district court to give further consideration to ARSA's claim for $1 million in damages and attorneys' fees for Burlington Northern's withdrawal of recognition. (App. B, p. 21a, *infra.*)

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE IN RAILWAY LABOR RELATIONS.

The court below has held, for the first time, that a carrier must recognize and bargain with a representational unit that is not a carrier-wide craft or class unit, as contemplated by the Railway Labor Act. It based that decision on the provisions of a merger protection agreement. This holding gives rise to serious and important questions affecting not only the employees of Burlington Northern, but a great number of other railroad employees as well; and it creates an unresolved dilemma for both railroads and their employees.

1. *Effect on Burlington Northern Employees.* Because of the ruling of the court below, the Burlington Northern employees in the units which ARSA claims to represent—the former Great Northern technicians and the former CB&Q mechanical supervisors—are precluded from changing their representation in accordance with the wishes of a majority of those employees. On the one hand, they cannot change their representation by petitioning for an election in the smaller units alone, because the NMB has repeatedly held that Sections 2 Fourth and 2 Ninth of the Act allow only carrier-wide craft or class representational and bargaining units,[20] and has accordingly declined to hold an election to determine the preference of a majority of the former Great Northern technicians' unit.[21] On the other hand, they evidently cannot change their representation by a vote on a carrier-wide basis either, because the court of appeals has held that ARSA has the right to continue to represent these employees, even though it does not claim the support of a majority

[20] See pp. 17-19, *infra*.

[21] See p. 6, *supra*, and note 29, p. 19, *infra*.

of their craft or class on the merged railroad as a whole, and that the 1973 vote, indicating that a majority of the mechanical supervisors carrier-wide wanted no representation, "did not affect" ARSA's nearly thirty-year-old certification as the representative of the former CB&Q supervisors. It is extraordinary that an agreement between an employer and a union should give the union such extensive immunity from the preferences of the employees it supposedly represents. To make matters worse, ARSA claims an unprecedented "continuing right" to represent employees under agreements with no expiration date, which remain in effect until changed.[22] If an employer and a union can by agreement establish representational units that are not carrier-wide, as the court below held, the employees should have some way to change the representation of the unit if they wish to do so.

2. *Effect on Other Railroad Employees.* If agreements between a railroad employer and a union can deprive employees of their right to change their representation on the Burlington Northern, they obviously can do so everywhere. In fact, provisions virtually identical to Sections 8 and 9 of the merger protection agreement here are found in almost all merger protection agreements entered into in connection with the many railroad mergers during the past fifteen years.[23] Thus, a considerable number of railroad employees work under agreements with provisions that could have the extraordinary effects on employee representation rights that the decision below gave to the merger protection agreement in this case.

3. *The Necessity for Guidance for Railroads and Their Employees.* On several occasions, most recently this past

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[22] See note 13, p. 8, *supra*.

[23] Hickey Dep. 33, 56-65; J.A. 39-40, 68, 81-82.

month,[24] this Court has given consideration to the proper procedures to determine issues as to bargaining units and representation [25] and the effect of transactions such as mergers [26] on employee rights under the Labor Management Relations Act. Such issues are no less important when they arise under the Railway Labor Act, particularly because that Act, unlike the LMRA, does not allow employers to petition the NMB for a determination of a union's representative status when bargaining unit and representational questions arise and the union refuses to seek a determination itself. It is essential for railroads and their employees to know how to proceed, since railroads have twin duties to bargain with "the true representatives of their employees" and *not* to bargain "with any who do not represent them," and since violations of those duties are not only unlawful but are criminally punishable and may even give rise—rightly or wrongly—to substantial claims for damages.

II. THE COURT BELOW ERRED IN HOLDING THAT REPRESENTATIONAL UNITS ARE NOT RESTRICTED BY THE RAILWAY LABOR ACT TO CARRIER-WIDE CRAFT OR CLASS UNITS.

The holding below that representational units for purposes of collective bargaining under the Railway Labor Act are not restricted by Section 2 Fourth of the Act to carrier-wide craft or class units is directly in conflict with (1) the plain terms of the Act, (2) repeated rulings by the National Mediation Board, (3) legislative history which is explicit with respect to this issue, and (4) the

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[24] *Linden Lumber Division* v. *N.L.R.B.*, 43 L.W. 4097 (Dec. 23, 1974).

[25] *Linden Lumber Division* v. *N.L.R.B., supra*; *N.L.R.B.* v. *Gissel Packing Co.*, 305 U.S. 575 (1969).

[26] *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249 (1974); *N.L.R.B.* v. *Burns Security Services*, 406 U.S. 272 (1972); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964).

decision of another court of appeals that is squarely in point.

1. *Conflict with the Railway Labor Act.* As stated above, the only representational unit for purposes of collective bargaining that is mentioned in the Railway Labor Act is the craft or class. Section 2 Fourth of the Act provides that "the majority of any *craft or class* of employees shall have the right to determine who shall be the representative of the *craft or class* for the purposes of this Act." 45 U.S.C. § 152 Fourth. (Emphasis added.) So too, Section 2 Ninth provides that the NMB shall determine disputes among employees "as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act" and shall certify the representative, after which the railroad must "treat with the representative so certified as the representative of the *craft or class* for the purposes of this Act." 45 U.S.C. § 152 Ninth. (Emphasis added.) The Railway Labor Act thus differs markedly from the Labor Management Relations Act, under which representatives may be "selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes.*" 29 U.S.C. § 159(a). (Emphasis added.)

2. *Conflict with Rulings of the National Mediation Board.* The NMB, which has jurisdiction under Section 2 Ninth of the Railway Labor Act to make representation and bargaining unit determinations pursuant to union or employee applications therefor, and whose interpretation of the Act in this regard is therefore entitled to great weight,[27] has held repeatedly that the "craft or class" is the only permissible bargaining unit under Section 2 Fourth and is functional in character and carrier-wide in scope. Moreover, it has held repeatedly that the same rule applies when the carrier is created through merger

[27] See *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

or consolidation of formerly independent carriers, as in the case at bar. Thus, in the famous *Switchmen's Union* case,[28] the NMB rejected the contention of the Switchmen's Union, after a consolidation involving the New York Central and other lines, that it was entitled to represent the craft or class of yardmen on the segments of the merged railroad on which it had represented yardmen prior to the merger. The Board held that such representation is not authorized under Section 2 Fourth of the Act, and therefore that it lacked the power to certify representatives on such a basis under Section 2 Ninth of the Act. The Board's holding in that regard was not a "policy determination," as the Court below suggested, but a square holding, based on careful consideration, that the only representation and bargaining unit allowed by the Act is the carrier-wide craft or class:

> "The Board does not undertake to discuss the relative advantages or disadvantages which may inhere in single or divided representation respectively. Doubtless serious arguments may be made both for and against each method. The Act leaves the Board in no doubt that Congress had in mind single representation for each craft or class on each carrier when enacting it; and that had the Congress thought of subdivisions of a craft or class or of a carrier as desirable methods of representation it would have made provision for their use." *Representation of Employees of New York Central R. Co., supra*, App. J, p. 77a, *infra*.

Numerous other decisions to the same effect were cited by the Board in its opinion, App. J, pp. 70a-73a, *infra*, and others are printed in Appendices K through N, *infra*. The

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[28] *Representation of Employees of New York Central R. Co.*, NMB Case No. R-690, 1 NMB Craft or Class Determinations 197 (1941) (App. J, *infra*), *sustained on merits, Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785 (D.C. Cir., 1943); *rev'd for lack of jurisdiction, Switchmen's Union* v. *Board*, 320 U.S. 297 (1943).

NMB has also confirmed these rulings in its annual reports. Thus, in its Sixteenth Annual Report in 1950 (p. 22), the NMB made it clear that the "craft or class" is carrier-wide in scope for purposes of the Act, in a discussion of "applications to represent only a part of a craft or class of employees":

> "The act provides that the majority of a craft or class shall have the right to determine the representative for the entire craft or class. In discharging its functions under the law, the Board has concluded in numerous cases that a craft or class includes all employees of a carrier performing related work. In addition, the Board has ruled on many occasions that representation disputes in any craft or class must be determined on a system-wide basis, and cannot be confined to the employees in any particular geographical area." NMB, 16th Ann. Rep. (1950), p. 22.[29]

3. *Conflict with the Legislative History of the Railway Labor Act.* The Board's construction of Sections 2 Fourth and 2 Ninth is firmly rooted in the legislative

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[29] Indeed, the NMB followed its long-established position in the present case. It dismissed GNRCTEA's application for certification as the representative of the Great Northern technicians, holding that the merger mooted that application. Since GNRCTEA had not abandoned its claim that it had the support of a majority of the former Great Northern technicians, the dispute between ARSA and GNRCTEA over the representation of that unit would not have been moot unless the NMB had determined that the unit itself had not survived the merger. The court of appeals disagreed with this interpretation, relying on the response of the NMB's Executive Secretary to ARSA, discussed on p. 6, *supra*, and an affidavit of the Executive Secretary to the same effect (App. B, p. 16a, *infra*), although neither the Executive Secretary nor the Court explained how the dispute could have been moot if the unit still existed. Therefore, we think that the Board's decision implied that the proper bargaining and representational unit on the Burlington Northern was carrier-wide in scope, as the Board has repeatedly held it must be.

history of the Act. Thus, when the 1934 Railway Labor Act was enacted, the railroads' representatives proposed amendments that would have authorized departures from carrier-wide craft or class bargaining units *by agreement*; but, as noted by the court of appeals in the *Switchmen's Union* case, their proposals were rejected:

> "Mr. M. W. Clement, chairman of the committee of the railroads designated to deal with the proposed amendments to the Act, opposed the majority rule provisions because he apparently thought that the craft or class unit was to be carrier wide . . . . He urged, but was unable to persuade, the Interstate and Foreign Commerce Committee of the House to add the following proviso to prevent this result: 'Provided, that only each class or craft *embraced in any existing agreement* shall be the employees to be considered to determine the majority of such employees for the purposes of representation.'" 135 F.2d, at 795.

Mr. Clement also tried unsuccessfully to persuade the Senate Committee on Interstate Commerce to amend the Act to allow for representational units that were not carrier-wide. He proposed that the provision that became Section 2 Ninth be changed by adding the italicized words and omitting the bracketed words in the following:

> "'If any dispute shall arise between a carrier's employees *or a group thereof* as to who are the representatives of such employees *or a group thereof* . . . , it shall be the duty of the Mediation Board . . . . Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the [craft or class] *such employees or group thereof* for the purposes of this Act. . . .'" 135 F.2d, at 795-796.

Even more authoritative was the testimony by the author of the 1934 Act, Joseph B. Eastman, Federal Coordinator of Transportation, who explained to the House Committee on Interstate and Foreign Commerce that the "craft or class" was carrier-wide and could not be limited geographically:

> "Mr. Huddleston. For illustration, let us take the case, we will say, of the machinists at a given shop when there are other machinists employed at other shops. Would these machinists at that particular shop be able to get together under this sentence and bargain with their employer?
>
> "Commissioner Eastman. Well, my understanding of the way in which the words 'craft' or 'class' have been defined in the past, is that they would cover the entire service of any particular carrier. That is, it would not be a class of employees, to pick out those that did work in a particular shop, but it would be all of the employees of the carrier, no matter in what shop they were located, who did that particular kind of work.
>
> "Mr. Huddleston. For that particular employer?
>
> "Commissioner Eastman. Yes, for that particular employer." *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650*, 73d Cong., 2d Sess. (1934), p. 57.

4. *Conflict with a Decision of the District of Columbia Circuit.* The determination of the NMB that even after a merger the carrier-wide craft or class is the only authorized representational unit for purposes of collective bargaining under the Railway Labor Act was affirmed by the U. S. Court of Appeals for the District of Columbia Circuit in the *Switchmen's Union* case.[30] That court stated:

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[30] *Switchmen's Union* v. *National M. Board*, 135 F.2d 785 (D.C. Cir. 1943), *rev'd for lack of jurisdiction*, 320 U.S. 297 (1943).

> ". . . The Act plainly provides that the *majority* of any craft or class shall determine *the representative* (not representatives) of the craft or class for the purposes of the Act . . . .
>
> * * *
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> "We . . . deny that Congress intended any geographical or divisional connotation to be given to the term 'craft or class'; it was intended only in the occupational or functional sense and not in the fractional, divisional, or regional sense.
>
> * * *
>
> "The Railway Labor Act deals only in terms of 'craft or class'; no other *unit* for collective bargaining is considered. *There is no authorization to the Board to subdivide or sectionalize, or to designate a representative upon any other basis than the craft or class unit.*" 135 F.2d, at 792-794. (Emphasis added.)

Thus, the Seventh Circuit's determination on the merits here conflicts with the contrary determination on the merits by the District of Columbia Circuit.[31]

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[31] This Court granted certiorari in the *Switchmen's Union* case, but did not reach the issue presented here when it decided the case. Instead, the Court held that the NMB's determination under Section 2 Ninth of the Act that the Union could not represent a unit that was less than carrier-wide was not reviewable by the courts. *Switchmen's Union* v. *Board*, 320 U.S. 297 (1943). If the NMB's ruling on GNRCTEA's application constitutes a determination in the present case under Section 2 Ninth that a less than carrier-wide bargaining and representational unit is improper on the Burlington Northern—a matter we discuss in note 29, p. 19, *supra*—then, of course, its determination in that regard would be nonreviewable under this Court's decision in *Switchmen's Union*, and the Seventh Circuit's assertion of jurisdiction to make a contrary determination would be erroneous. See also *Brotherhood of Railway and Steamship Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963). But if, as the Seventh Circuit held, the NMB's ruling did not determine this question, then there has been *no* NMB determination under Section 2 Ninth as to the proper scope of the bargaining unit here, and hence this Court's holding of nonreview-

5. *The Merger Protection Agreement Cannot Abrogate the Representation Provisions of the Railway Labor Act.* In rejecting Burlington Northern's contention that the carrier-wide craft or class is the only authorized bargaining unit under the Railway Labor Act, the court below relied on the merger protection agreement. It held that even if that agreement, which it construed as an agreement to recognize ARSA as the representative of only part of a carrier-wide craft or class,[32] were inconsistent with any provisions of the Railway Labor Act, the provisions of the agreement would be controlling, because that agreement "was a condition of the I.C.C. approval of the merger, authorized by Section 5(2)(f) of the Interstate Commerce Act," and "was entered into . . . in contemplation of the merger." (App. B, p. 18a, *infra.*)

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ability in *Switchmen's Union* is not relevant to this case, and the conflict on the merits between the Seventh Circuit and the District of Columbia Circuit remains.

[32] Although we do not present here the question of the proper interpretation of Section 8 of the agreement—a matter which, as we shall show, is exclusively committed to arbitration—we note in passing that the court of appeals' interpretation of that Section is insupportable. Section 8 provided that Burlington Northern would assume all collective bargaining agreements "concerning *rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto* in effect at the time of the consummation of the merger." (Emphasis added.) It had nothing whatever to do with agreements concerning the representation of employees. Indeed, under the Act, representation, unlike "rates of pay, rules, or working conditions," the statutory subjects of collective bargaining (45 U.S.C. § 156), *cannot* be determined by collective bargaining agreements, but *only* by a "majority of [each] craft or class of employees." (Section 2 Third, Fourth.) In Section 8, then, the parties defined the obligations assumed by the merged railroad in terms that avoided any effect on representation. Moreover, the agreement made it clear in several provisions that a "completely integrated" operation, essential to achieve the purposes of the merger, and therefore a single set of rules applicable to each craft, were contemplated by the agreement. (J.A. 45, 50, 57, 108-111.)

At the outset, the factual premise that the I.C.C. required recognition of ARSA as a condition of approval of the merger is insupportable, because the I.C.C. decision, rendered prior to the execution of the merger protection agreement involved in this case, said nothing about bargaining units and representation. But even if the issue can nevertheless be reached, the holding below that a merger protection agreement, however it is interpreted or construed, can override the representation rights of employees under the Railway Labor Act is one that itself deserves review by this Court because of its obvious importance to the affected employees and because it is flatly opposed to this Court's own decisions as to the purpose and effect of the labor protection provisions in Section 5 of the Interstate Commerce Act.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), directs the I.C.C., as a condition of its approval of any merger, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected," and Section 5(11) of the Act, 49 U.S.C. § 5(11), provides that any carrier participating in an approved merger "shall be . . . relieved from the operation of [other laws] insofar as may be necessary to enable them to carry into effect the [merger] in accordance with the terms and conditions, if any, imposed by the Commission." An agreement stripping employees of their right to determine their own representation in accordance with the majority rule provisions of the Railway Labor Act cannot be called a "fair and equitable arrangement" to "protect the interests" of employees, or "necessary to enable [carriers] to carry into effect" mergers approved by the Commission. The legislative history of these provisions, which this Court has described at length and considered in detail, makes it clear that Congress contemplated only the protection of *compensation.* See *Maintenance Employes* v. *United States,* 366 U.S.

169, 172-178 (1961). Congress clearly did not mean to authorize employers and unions to interfere with employee representation rights under the guise of merger "protection."

The case on which the court below relied for its contrary conclusion, *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 431-432 (8th Cir. 1963), had nothing whatever to do with representation. That case concerned a dispute over the integration of seniority rights under a merger protection agreement. The court held that the dispute should be resolved pursuant to the arbitration provisions in the merger protection agreement. Neither the court that decided that case, nor any other court, has *ever* before suggested that the Interstate Commerce Act provisions were intended by Congress to authorize a merger protection agreement to override the representation provisions of the Railway Labor Act.

III. EVEN IF THE RAILWAY LABOR ACT DID SOMETIMES PERMIT REPRESENTATIONAL UNITS THAT ARE NOT CARRIER-WIDE CRAFT OR CLASS UNITS, THE COURT BELOW ERRED IN INTERPRETING THE MERGER PROTECTION AGREEMENT HERE TO THAT END, FOR IT HAD NO JURISDICTION TO DO SO.

Even if a carrier were not completely and universally prohibited by Section 2 Fourth of the Railway Labor Act from ever recognizing and bargaining with representational units that are less than carrier-wide craft or class units, the decision of the court below that in this case Burlington Northern must recognize and bargain with ARSA would still be erroneous. For the court based that holding on its interpretation and application of the merger protection agreement—which it construed as an agreement to recognize ARSA after the merger as the representative of less than carrier-wide bargaining units—

and it is clear that the interpretation and application of the agreement are within the exclusive jurisdiction of the arbitration board established by Section 9 of the agreement. The court's assertion of jurisdiction to interpret and apply the agreement in this regard and to declare that the railroad was in "breach" thereof conflicts (1) with applicable decisions of this Court as to jurisdiction to decide disputes concerning the interpretation and application of collective bargaining agreements, and (2) with a decision of the Fifth Circuit that an arbitration provision in a merger protection agreement, identical to the arbitration provision involved in this case, is mandatory and exclusive. Hence, even if this question is reached, it too raises an issue which warrants granting the writ of certiorari.

1. *Conflict with Decisions of this Court.* It is settled that in labor arbitration disputes, arbitrability is to be decided by the courts. *E.g., Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960); *id.*, at 571 (concurring opinion); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). However, once it is decided that a dispute is arbitrable—that it "is governed by the contract"—the court has "no business weighing the merits" or determining whether the "particular language" of the agreement supports one side or the other. *Steelworkers* v. *American Mfg. Co., supra*, at 568. This Court has held squarely that the interpretation of the agreement is for the arbitrator, not the court. *Ibid.*; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960). The same rule applies to railway labor disputes. Courts lack jurisdiction to interpret agreements subject to arbitration. *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (1959); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Order of Conductors* v. *So. Ry. Co.*, 339 U.S. 255 (1950). The court of appeals' assertion of power to interpret Section 8 of the merger protection agreement conflicts

with this Court's decisions as to the respective roles of the court and the arbitrator in disputes subject to arbitration.

2. *Conflict with a Decision of the Fifth Circuit.* The court of appeals' assertion of jurisdiction to interpret and apply disputed provisions of the merger protection agreement also conflicts with a decision of the Fifth Circuit, *New Orleans & Northeastern R. Co.* v. *Bozeman*, 312 F.2d 264 (5th Cir. 1963).[33] That case involved a dispute over the interpretation and application of a merger protection agreement with an arbitration provision identical to Section 9 of the agreement involved in this case. *Id.*, at 266. The union sought arbitration; the carrier sought a determination by the court. The district court originally held that "the provision for aribtration was not mandatory and was not exclusive," *id.*, at 267; and it decided the dispute on the merits. However, the district court then reconsidered and held that the dispute had to be arbitrated, and the Fifth Circuit affirmed. The Seventh Circuit's assertion of jurisdiction to construe and apply the agreement here is directly in conflict with that decision.[34]

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[33] *Accord: United Transportation Union* v. *Norfolk & Western Ry. Co.*, 332 F.Supp. 1170 (N.D. Ohio, 1971).

[34] See also *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir., 1963), in which the Eighth Circuit likewise held that the machinery to resolve disputes established by merger protection agreements is, in effect, mandatory and exclusive with respect to disputes of the kind to which it applies.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Statutes Involved

Railway Labor Act

SECTION 2, 45 U.S.C. § 152

* * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages

of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the

carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United

States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

* * *

SECTION 3, 45 U.S.C. § 153

First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the approprate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of

carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly

make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith

on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Labor Management Relations Act

SECTION 9, 29 U.S.C. § 159

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the

individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this sub-

chapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * *

Interstate Commerce Act

SECTION 5(2)(f), 29 U.S.C. § 5(2)(f)

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

SECTION 5(11), 49 U.S.C. § 5(11)

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

APPENDIX B

Opinion of Court of Appeals *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-1820

BURLINGTON NORTHERN, INC.,
Plaintiff-Counterdefendant-Appellee,

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION,
Defendant-Counterplaintiff-Appellant.

No. 73-1821

BURLINGTON NORTHERN, INC.,
Plaintiff-Counterdefendant-Appellant,

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION,
Defendant-Counterplaintiff-Appellee.

Cross-Appeal from Orders from the United States
District Court for the Northern District of Illinois,
Eastern Division—No. 71 C 2002
William J. Bauer, Judge

ARGUED MAY 28, 1974—DECIDED SEPTEMBER 17, 1974

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* Reported at 503 F.2d 58.

Before CLARK, *Associate Justice*,** TONE, *Circuit Judge*, and CAMPBELL, *Senior District Judge*.**

PER CURIAM. This appeal arises out of a labor dispute between Burlington Northern, Inc. and the American Railway Supervisors Association (ARSA). Plaintiff Burlington Northern seeks a judgment declaring that it has no obligation to bargain on any subject with defendant ARSA, or to treat ARSA as the representative of any of its employees. Additionally, plaintiff asks the court (1) to declare that, despite the arbitration provision of the Employees Merger Protection Agreement to which plaintiff and defendant are parties, it need not arbitrate this controversy with defendant, and (2) to enjoin ARSA and codefendant National Mediation Board (NMB) from persisting in their attempt to obtain resolution of the dispute through the arbitration procedure set forth in that agreement. Defendant counterclaims, asking that plaintiff be required to submit to arbitration concerning the interpretation and application of the Employees Merger Protection Agreement according to the terms of that agreement, and for $1,000,000 in damages and reasonable attorneys' fees and costs.

The District Court granted summary judgment for defendants on the complaint, holding that the court lacked jurisdiction to decide what was essentially a representation issue within the exclusive jurisdiction of the NMB. *Burlington Northern, Inc.* v. *American Ry. Sup'rs Ass'n*, 350 F. Supp. 897, 904 (N.D. Ill. 1972). On the same basis, the judge also granted plaintiff's motion to dismiss defendant's counterclaim. *Burlington Northern, Inc.* v. *American Ry. Sup'rs Ass'n*, 359 F. Supp. 1047, 1049-1050 (N.D. Ill. 1973). We affirm, although on other grounds, the court's dismissal of the railroad's com-

** Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) and Senior District Judge William J. Campbell of the Northern District of Illinois are sitting by designation.

plaint, but hold that plaintiff is required to proceed with arbitration under Section 9 of the Employees Merger Protection Agreement and therefore reverse the dismissal of defendant's counterclaim.

Plaintiff Burlington Northern, Inc. was formed on March 2, 1970 by the merger of the Chicago, Burlington & Quincy Railroad (CB&Q), the Great Northern Railway, the Northern Pacific Railway, and the Pacific Coast Railroad. The merged company has also leased the Spokane, Portland & Seattle Railroad. Each of the component railroads was—and the Burlington Northern presently is—a carrier subject to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* The Interstate Commerce Commission (ICC) authorized the merger and lease pursuant to Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5. *Great Northern Pac. & B. Lines Merger*, 331 I.C.C. 228 (1967), *aff'd, United States v. United States*, 296 F. Supp. 853 (D.D.C. 1968), *aff'd, Northern Lines Merger Cases*, 396 U.S. 491 (1970).

Prior to the merger, the craft or class of mechanical supervisors employed by the CB&Q was represented by defendant ARSA, which had been certified as the representative of these employees by the NMB after a representation election held on August 19, 1944. No union represented the mechanical supervisors employed by the other merging railroads. The most recent collective bargaining agreement entered into between ARSA and CB&Q is dated March 1, 1970, one day before the merger, and was in fact finally negotiated and executed by Burlington Northern and ARSA on or about April 2, 1970, one month after the merger. This agreement provided for changes in rates of pay, rules and working conditions of employees represented by ARSA employed by the Burlington Northern and working on the segment of the railroad formerly operated by CB&Q. By separate agreement also dated March 1, 1970 and also finally negotiated

and executed between ARSA and plaintiff Burlington Northern on April 2, 1970, plaintiff agreed to make regular monthly dues collections from certain employees represented by ARSA provided the employees authorized the deductions. Plaintiff complied with the provisions of these and the predecessor collective bargaining agreements with ARSA, and continued to settle employee grievances with ARSA for several months after the merger date.

The craft or class of technicians employed by the Great Northern before the merger was also represented by ARSA, which had received NMB certification to represent the Great Northern technicians after a representation election held on December 7, 1960. The technicians on lines other than the Great Northern were not represented by any labor organization.

Since the merger there has been no challenge by any other union or any employees to the right of ARSA to represent the mechanical supervisors on the segment of the merged railroad formerly operated by the CB&Q, or to represent the technicians on the segment formerly operated by the Great Northern. There is thus no dispute involving competing employee groups, as envisioned in 45 U.S.C. § 152 Ninth.

Before approving the merger the ICC, following the mandate of 49 U.S.C. § 5(2)(f), imposed upon the new carrier conditions that would take effect at the time of consolidation and would protect the employees of the components lines. Certain of these protective provisions were incorporated in an Employees Merger Protection Agreement agreed to on January 18, 1968. Both plaintiff and defendant ARSA, as well as each of the component rail lines and five other unions, were signatory to the agreement.

Section 8 of the agreement provides:

> "The New Company [Burlington Northern] will take over and assume all contracts, schedules and agreements between said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto."

Section 9 provides, *inter alia*, that:

> "In the event any dispute or controversy arises between the said carriers or the New Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement . . . such dispute may be referred by either party to an arbitration committee for consideration and determination. . . . Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member. . . ."

Commencing in the summer of 1970, several months after the merger, plaintiff refused to recognize and treat ARSA as the designated representative of either the mechanical supervisors formerly employed by CB&Q or the technicians formerly employed by the Great Northern. Plaintiff's repudiation of the ARSA collective bargaining agreements was apparently based upon the NMB's June 3, 1970 dismissal on the ground of mootness of a petition by technicians on the Great Northern seeking to invoke the jurisdiction of NMB under Section 2 Ninth. Plaintiff asserts that "it understood the NMB action to mean that the merger had terminated a separate existence of

the Great Northern Technicians' bargaining unit." In responding to an inquiry as to whether the dismissal notice was intended to imply that ARSA was no longer the certified representative, however, NMB Executive Secretary Thomas A. Tracy stated on July 14, 1970 that its action did not "nullify or disturb any representation rights arising out of the certification issued" on December 7, 1960 declaring ARSA to be the representative of the Great Northern technicians. Moreover, in response to the affidavit (May 24, 1972) of the plaintiff's Vice President for Labor Relations that the NMB had "ruled" that ARSA representation rights were terminated by the merger, the NMB submitted its Executive Secretary's affidavit (June 9, 1972) stating that "no such determination was made, expressly or impliedly, in the National Mediation Board's dismissal notice of June 3, 1970."

ARSA, contending that Burlington's refusal to deal with the duly authorized pre-merger mechanical supervisors and technicians union violated Section 8 of the Employees Merger Protection Agreement, sought arbitration of the dispute under the terms of Section 9 of that agreement. ARSA's demand for arbitration stated the question to be arbitrated in pertinent part as follows:

> "Was Burlington Northern required by Section 8 of the merger protective agreement executed on January 18, 1968, . . . to take over and assume the collective bargaining agreement[s] between [CB&Q and ARSA for mechanical supervisors, and Great Northern and ARSA for technicians] . . . including the continuing right thereunder of the American Railway Supervisors Association to act as the representative of the employees covered by said agreements. . . ."

Plaintiff refused to proceed with arbitration under the Merger Protection Agreement and refused to designate a member of the arbitration committee. ARSA then, in ac-

cordance with the provisions of Section 9 of the Merger Protection Agreement, requested NMB to appoint a neutral referee. Thereupon plaintiff filed this action.

Before reaching the merits we must consider the threshold issue of whether this court has jurisdiction to decide the questions presented in the cross-appeals. The District Court held that the controversy between plaintiff and ARSA was in essence a Railway Labor Act representation dispute, the resolution of which must be left to the NMB, and on this ground, dismissed both the complaint and the counterclaim. We disagree with the District Court on this point. In our view, the dispute before us is not one under 45 U.S.C. § 152 Ninth, because no employee or other union has challenged ARSA's certification. The cases cited by the District Court in support of its holding all involve representation disputes between unions or employee groups under 45 U.S.C. § 152 Ninth. *Burlington Northern, Inc.* v. *American Ry. Sup'rs Ass'n, supra,* 350 F. Supp. at 901, n. 8, and 904. The issue before the court in this case, the effect of the pre-merger agreement between the two parties to this action, is a common-law contract determination within the province of the federal courts and is not reserved to the exclusive jurisdiction of the NMB. We thus turn to the merits.

Plaintiff defends its refusal to bargain with ARSA and to submit to arbitration by relying on the admitted fact that ARSA does not represent a majority of the entire craft or class of either the mechanical supervisors employed by plaintiff or the technicians employed by plaintiff. Plantiff's position is that ARSA is not the representative of the employees it seeks to represent because the NMB has determined, in exercising its certification responsibilities under 45 U.S.C. § 152 Ninth, that a class or craft under 45 U.S.C. § 152 Fourth must be carrier-wide in scope. (*See, e.g.,* NMB, 16th Annual Report 1950, p. 22, and *Representation of Employees of*

New York Central R. Co., 1 NMB Craft or Class Determinations 197-210 (May 27, 1941).) ARSA, says plaintiff, purports to represent only the mechanical supervisors formerly employed by CB&Q and the technicians formerly employed by the Great Northern and does not represent either of these crafts or classes system-wide. The other mechanical supervisors and technicians in the plaintiff's system are unrepresented.

In making this argument plaintiff ignores the terms of the Employees Merger Protection Agreement, which anticipated the conditions that would exist after the merger, and specifically provided, in Section 8, that plaintiff will assume "all contracts, schedules and agreements between said carriers and the labor organizations signatory hereto. . . ."

The Employees Merger Protection Agreement was a condition of the ICC approval of the merger, authorized by Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f). The agreement is not inconsistent with any provision of the Railway Labor Act, and if it were its provisions would be controlling, *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F. 2d 424, 431-432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963); it was entered into by the parties to this case in contemplation of the merger and the conditions that would exist after the merger; and there is no reason it should not be given full force and effect.

In the agreement plaintiff recognized the labor organizations signatory to the agreement including ARSA, committed themselves to maintain and abide by all collective bargaining agreements until such agreements are changed pursuant to the procedures of the Railway Labor Act, agreed to a system for resolving disputes concerning the interpretation and application of the agreement, and agreed to a continued role for ARSA in the implementation of the merger agreement and in the in-

terpretation, application and enforcement of existing collective bargaining agreements.

The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act does not automatically render applicable the NMB's policy determination under the act that a class or craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect. Compare *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 792 (D.C. Cir. 1943), *rev'd on other grounds*, 320 U.S. 297 (1943). If the contrary were true, the Merger Protection Agreement, which became effective only when the merger became effective, would have become a nullity upon its effective date, and the representation rights of ARSA would be terminated by the very agreement that purports to continue them in force. Plaintiff itself recognized that this was not intended by the Employees Merger Protection Agreement when it entered into a new collective bargaining agreement with ARSA after the effective date of the merger and continued to recognize ARSA for all purposes for a period of several months after that date.

The NMB has twice repudiated plaintiff's contention that its action in dismissing the Great Northern technicians' petition on June 3, 1970 implied that the merger terminated ARSA's status as the certified representative of the technicians. The indications NMB has given as to its position in this matter are to the effect that it still recognizes ARSA as the bargaining representative under the collective bargaining agreements entered into between ARSA and plaintiff's predecessors. With the ex-

ception described below, there has therefore been no invocation of NMB's powers to determine representation under 45 U.S.C. § 152 Ninth.

Plaintiff relies upon a fact that was not a part of the record before the District Court. In 1973 ARSA applied to the NMB to investigate and determine the representation of mechanical supervisors employed by Burlington Northern. A majority of the 569 eligible mechanical engineers chose not to participate in the ensuing representation election. Of the 153 who did vote, 139 voted for ARSA. In an order entered while this appeal was pending, the NMB found "no basis for Certification" and dismissed the application, because fewer than a majority of the eligible employees voted in the election. This proceeding, occurring after plaintiff had refused for almost three years to honor its obligations under the Employees Merger Protection Agreement, could not justify or cure plaintiff's breach. In any event, the failure of ARSA to gain system-wide representation in an election it had requested itself did not affect its certification as representative of the mechanical supervisors on the CB&Q segment of the merged railroad.

When an agreement to arbitrate is one of the protections afforded employees under Section 5(2)(f) of the Interstate Commerce Act, the obligation to arbitrate will be enforced by the courts. *Brotherhood of Lomomotive Engineers* v. *Chicago & North Western Ry., supra*, 314 F. 2d at 433; *New Orleans & Northeastern R. R.* v. *Bozeman*, 312 F. 2d 264 (5th Cir. 1963).

The District Court's order dismissing the complaint is affirmed. The order dismissing the counterclaim is reversed and remanded with directions that Burlington Northern be ordered to arbitrate its disagreement with ARSA, as provided in Section 9 of the Employees Merger Protection Agreement, and that the District Court give

further consideration consistent with this opinion to ARSA's claim for damages, attorneys' fees and costs.

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Judgment of Court of Appeals

—Per curiam opinion—

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 73-1820, 73-1821

September 17, 1974

Before

Hon. TOM C. CLARK, Associate Justice, Supreme Court *

HON. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge **

BURLINGTON NORTHERN, INC.,
Plaintiff-Counterdefendant-Appellee (Appellant),

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOC.,
Defendant-Counterplaintiff-Appellant (Appellee).

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Senior District Judge William J. Campbell of the Northern District of Illinois sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court filed this day.

IT IS FURTHER ORDERED that The American Railway Supervisors Association recover their costs in both appeals.

APPENDIX D

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

No. 73-1820, 73-1821

October 23, 1974

Before

Hon. TOM C. CLARK, Assoc. Justice

HON. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Sr. District Judge

BURLINGTON NORTHERN, INC.,
Plaintiff & Counter Defendant-Appellee,
Cross-Appellant,

vs.

AMERICAN RAILWAY SUPERVISORS ASSOCIATION,
Defendant & Counter Plaintiff-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Divsn.
(71 C 2002)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX E

Memorandum Opinion and Order of District Court, August 21, 1972 *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 2002

BURLINGTON NORTHERN, INC., a corporation,
Plaintiff,

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This cause comes on cross-motions for summary judgment made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The following facts are uncontroverted: Plaintiff Burlington Northern Inc. ("Burlington Northern"), a Delaware corporation, is a "carrier" as defined by section 1 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 First. Plaintiff was formed on March 2, 1970, by the merger of the properties and franchises of the Great Northern Railway Company ("Great Northern"); the Chicago, Burlington & Quincy Railroad Company ("CB&Q"); the Northern Pacific Railway Company ("NP"); the Pacific Coast Railroad Company ("PCRR") and by the lease by the surviving company of all properties owned, used, or operated by the Spokane, Portland

* Reported at 350 F. Supp. 897.

& Seattle Railway Company ("SP&S").[1] Prior to the merger, each of these component lines was a "carrier" within the meaning of the RLA. Upon the effective date of the merger, the component lines ceased to exist as corporate entities[2] and carriers, the railroad operations of the component lines were merged and integrated, and the employees of the component lines were intermingled and became employees of the Burlington Northern.

Prior to the merger, the craft or class of mechanical supervisors employed by the CB&Q was represented by defendant American Railway Supervisors Association ("ARSA"), an Illinois corporation. ARSA had been duly certified by defendant National Mediation Board ("NMB") as representative of such employees pursuant to a representation election held on August 19, 1945; subsequent to the election, CB&Q recognized ARSA as the collective bargaining representative for all of its mechanical supervisors. The most recent collective bargaining agreement entered into between ARSA and CB&Q is dated March 1, 1970, one day before the effective date of the merger. The mechanical supervisors which had been employed by component lines other than the CB&Q had either been represented by labor organizations other than ARSA or had been unrepresented.[3]

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[1] Great Northern, CB&Q, NP, PCRR, and SP&S will hereinafter be referred to as the "component lines".

[2] Except for SP&S which retained its corporate identity.

[3] At the time of the merger, CB&Q employed 110 mechanical supervisors, all of which were represented by ARSA. Great Northern employed 240 supervisors which were represented by the Association of Mechanical Supervisors of the Great Northern Railway Company, NP employed 170 which had not been represented by any labor organization since 1969, and SP&S employed 19 which were represented by the Association of Supervisors of Mechanics. Thus, immediately prior to the merger, approximately 20% of the supervisors ultimately employed by the Burlington Northern were represented by ARSA; conversely, approximately 80% of such supervisors were either represented by labor organizations other than ARSA or were unrepresented.

Prior to the merger, the craft or class of technicians employed by the Great Northern was represented by ARSA. ARSA had been duly certified by NMB as representative of such employees pursuant to a representation election held on December 7, 1960; subsequent to the election, the Great Northern recognized ARSA as the collective bargaining representative for all of its technicians and negotiated agreements with ARSA with respect to rates of pay, rules and working conditions of such employees. The technicians which had been employed by component lines other than the Great Northern had been unrepresented.[4]

Due to the requirements of section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, the Burlington Northern merger required the approval of the Interstate Commerce Commission ("ICC"). Although the ICC originally denied the application for the merger,[5] it later reconsidered its decision and approved the application.[6] As a condition precedent for its approval of the merger, however, the ICC, following the mandate of section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), imposed upon the new carrier protective conditions for the employees of the component lines to become effective when the merger became effective. Certain of these protective provisions imposed by the ICC were incorporated in an Employees' Merger Protection Agreement ("Agreement") entered into on January 18, 1968.

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[4] At the time of the merger, Great Northern employed 105 technicians, CB&Q employed 73, NP employed 71, and SP&S employed 17. Thus, the Great Northern technicians, represented by ARSA, constituted approximately 40% of the technicians employed by Burlington Northern immediately after the merger.

[5] *Great Northern Pac.—Merger—Great Northern*, 328 I.C.C. 460 (1966).

[6] *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967), *aff'd, United States* v. *United States*, 296 F.Supp. 853 (D.D.C. 1968), *aff'd, United States* v. *I.C.C.*, 396 U.S. 491 (1970).

The parties signatory to the Agreement were the component lines; the Burlington Northern, as the "New Company"; and the labor organizations, including ARSA, representing the non-operating employees of the component lines.

Section 8 of this Agreement provides:

> The New Company will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto.

Subsequent to the merger, Burlington Northern refused to recognize and treat ARSA as the designated representative of the mechanical supervisors formerly employed by CB&Q and the technicians formerly employed by the Great Northern. The reason proffered by Burlington Northern for such action is as follows:

> Following the merger, it became evident that ARSA lacked the allegiance of a majority of any craft or class of Burlington Northern employees. Burlington Northern therefore took the position that ARSA is not the representative of any of its employees for purposes of collective bargaining under the Railway Labor Act, and accordingly Burlington Northern is not obliged to bargain with ARSA before changing the pay and working conditions of any of its employees. *Plaintiff's Memo in Opposition to Motion of NMB* at 2.

ARSA readily admits that it does not represent a majority of all of the mechanical supervisors or tech-

nicians employed by the Burlington Northern; it does contend, however, that it is the duly designated and authorized representative for those employees that it represented prior to the merger. ARSA notes that no other union, employee or group of employees is presently challenging the right of ARSA to so represent those employees.

Section 9 of the Agreement provides:

> In the event any dispute or controversy arises between the said carriers or the New Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement . . . which cannot be settled by said carriers or the New Company and the labor organization . . . involved . . ., such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman . . . . Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member . . . . If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. . . . The decision of the majority of the arbitration committee shall be final and binding . . . .

After Burlington Northern refused to recognize and treat ARSA as the designated representative of those employees ARSA claimed to represent, and after reconciliation conferences between the parties came to naught, ARSA, pursuant to section 9 of the Agreement, on or about June 3, 1971, served a notice on Burlington Northern of its intent to refer the dispute to arbitration. The dispute to be arbitrated was stated as follows:

> Was Burlington Northern required by Section 8 of the merger protective agreement executed on January 18, 1968 . . . to take over and assume the collective bargaining agreement between Chicago, Burlington & Quincy Railroad Company and the American Railway Supervisors Association covering mechanical supervisors and the agreement between Great Northern Railway Company and the said Association covering technicians in effect at the time of consummation of the merger of said railroads into Burlington Northern and be bound by the terms and provisions of said agreements, including the continuing right thereunder of the American Railway Supervisors Association to act as the representative of the employees covered by said agreements, and is this a continuing obligation of Burlington Northern until such terms and provisions are changed in accordance with the provisions of the Railway Labor Act, as amended?

Through certain correspondence in June, 1971, Burlington Northern made known its refusal to proceed with arbitration under the Agreement. On July 1, 1971, after Burlington Northern refused to designate a member of the Arbitration Committee, ARSA, in accordance with the provisions of section 9 of the Agreement, requested the NMB to appoint a neutral referee. By letter dated August 5, 1971, the NMB advised ARSA and Burlington Northern that it had docketed the matter and designated it as Special Board of Adjustment No. 775.

Immediately thereafter Burlington Northern filed the instant suit seeking (1) to enjoin the demanded arbitration and (2) to have this Court issue a declaration confirming its unilateral activities. Named as defendants in the instant suit were George S. Ives, David H. Stowe, and Peter C. Benedict, in their capacity as members of the NMB; the NMB; and ARSA. In its answer to the complaint, the NMB has affirmatively stated its intention to appoint a neutral member of the Arbitration Committee.

The instant motions have presented this Court with several interesting legal issues; in this Court's opinion, however, the most important of these is whether this Court has jurisdiction to determine whether the Burlington Northern must recognize ARSA as the bargaining representative of the employees that ARSA claims to represent.

I. PLAINTIFF'S ARGUMENT

Burlington Northern, asserting that this Court has such jurisdiction, argues as follows: The selection of "representatives" for purposes of collective bargaining under the RLA is governed by sections 2 Fourth and 2 Ninth of the RLA, 45 U.S.C. §§ 152 Fourth, 152 Ninth. The only representation or bargaining unit provided for by those provisions is a "craft or class" of employees; the RLA makes no provision for any other kind of representation or bargaining unit.[7]

The National Mediation Board, which has jurisdiction under section 2 Ninth of the RLA, 45 U.S.C. § 152

[7] It should be noted that in this respect the RLA differs from the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.* Section 9(a) of the LMRA, 29 U.S.C. § 159(a), provides that bargaining representatives covered by that Act must be

> selected . . . by the majority of the employees in a unit appropriate for such [bargaining] purposes . . . .

Ninth, to make "craft or class" determinations pursuant to union or employee applications therefor [8] has ruled repeatedly that a "craft or class" [9] must be functional in character and carrier-wide in scope.[10]

The NMB applies the same rule even when the carrier is created through the merger or consolidation of formerly independent carriers, as in the instant case. Thus, in *Representation of Employees of New York Central R. Co.*, NMB Case No. R-690, 1 NMB Craft or Class Determinations 197 (May 27, 1941), the NMB rejected the contention of the Switchmen's Union of North American ("SUNA") that the SUNA was entitled to represent yardmen on portions of a consolidated railroad on which it had represented yardmen prior to the consolidation, stating:

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[8] Under section 2 Ninth of the RLA, a representation dispute exists only where an issue has been raised "among a carrier's employees as to who are the representatives of such employees." Thus, a representation dispute may be raised only by the employees of a carrier or by a union claiming to represent such employees, *Brotherhood of Locomotive Firemen & Enginemen* v. *N.M.B.*, —— U.S.App.D.C. ——, 410 F.2d 1025, *cert. denied*, 396 U.S. 878 (1969). The NMB has held consistently that a carrier is not even a party to section 2 Ninth disputes, *Thirty-Seventh Annual Report of the National Mediation Board* at 33 (1971), and its view in this respect is shared by the Supreme Court, *Brotherhood of Railway and Steamship Clerks* v. *Ass'n for Benefit of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965). It should be noted that the RLA differs from the LMRA in this respect also.

[9] It has been observed that "[w]hile 'craft' and 'class' may not be synonomous as used in the Act, this could only be because 'class' may be more comprehensive." *Switchmen's Union* v. *N.M.B.*, 135 F.2d 785, 793 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

[10] *See, e.g., Representation of Employees of Denver & Rio Grande Western R. Co.*, NMB Case No. R-1826 (May 28, 1947); *Representation of Employees of New York Central R. Co.*, NMB Case No. R-690 (May 27, 1941); *Representation of Employees of Pennsylvania R. Co.*, NMB Case No. R-305 (May 7, 1937).

> As the Board views the subject under consideration, it feels bound to conclude that no issue has been raised in this case as to what is a craft or class under the [RLA]. There is no dispute that the class or craft of 'yardmen' embraces foremen or conductors, helpers or brakemen, switch-tenders, and car-retarder operators. The issue actually raised is simply a question as to whether this craft or class of 'yardmen' may be broken into separate groups on the Railroad Company with a resulting right in any group to demand separate group representation . . . .
>
> The National Mediation Board . . . has reached the conclusion that, since the New York Central Railroad Co. and all of its operated subsidiaries . . . constitutes a single carrier for the purposes of the Railway Labor Act, all of the employees of any given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the [RLA]. *Id.* at 209-10.

Indeed, plaintiff argues, the NMB has applied the same rule with respect to the Burlington Northern merger. Following the merger, the NMB dismissed the pending application for decertification of ARSA and certification of another organization as the representative of technicians employed by the Great Northern. The NMB stated:

> The Board finds that since the carrier known as the Great Northern Railway Company is no longer in existence, the application as presented is moot. *Representation of Employees of Burlington Northern*, NMB Case No. R-4043 (June 3, 1970).

Plaintiff asserts that the NMB's decision in the *Burlington Northern* case

is a square holding that the old Great Northern technicians' bargaining unit no longer exists, for otherwise the competing union's petition for certification would not have been moot, and the Board would have had to determine whether that union or ARSA had the support of a majority of the members of the unit; for if the competing union had a majority, that union, not ARSA, would be entitled to represent the technicians ARSA now claims to represent. *Plaintiff's Memo in Opposition to Motion of ARSA* at 18.

The NMB's construction of the RLA has been endorsed by the courts. Thus, as stated in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railroad Co.*, 383 F.2d 225, 228 (D.C. Cir. 1967), the RLA "authorizes the [NMB] to designate the bargaining agent for railroad employees and, as the Board itself has construed it, refers only to certifications of single carrier units." *In accord, Switchmen's Union* v. *N.M.B.*, 135 F.2d 785, 794 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

Thus, relying upon the authorities set forth hereinabove, Burlington Northern concludes that ARSA cannot be the bargaining representative for the technicians and mechanical supervisors it claims to represent since ARSA claims to represent neither all of the technicians nor all of the mechanical supervisors employed by the Burlington Northern.

Having concluded that it is under no legal duty to bargain with ARSA, Burlington Northern argues that this Court has jurisdiction to declare the same and to enjoin the arbitration that ARSA has demanded. Plaintiff notes that it is well settled that courts have jurisdiction to determine statutory issues arising under the RLA as long as "no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board." Railroad Trainmen v. Howard, 343 U.S. 768, 774

(1952).[11] Under the RLA, carriers have a positive duty to bargain with the true representatives of their employees and a negative duty not to engage in "such bargaining with any who do not represent them." *Virginian R. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937). Courts, therefore, have jurisdiction to determine whether the conduct of a particular carrier satisfies the duty to bargain, so long as the question does not turn on an issue within the exclusive jurisdiction of an administrative tribunal, *Chicago & N.W. R. Co.* v. *United Transportation Union*, 402 U.S. 570, 578-79 (1971); *Virginian R. Co.* v. *System Federation No. 40*, *supra* at 550; *Pan American World Airways* v. *Teamsters*, 275 F.Supp. 986, 995-96 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2nd Cir. 1969).

While Burlington Northern admits that the NMB has jurisdiction to determine which of two contending labor organizations has the support of a majority of the employees in a bargaining unit and is therefore entitled to recognition, it asserts that no such dispute is involved in the instant case. Rather, plaintiff argues, the dispute here is over the question of whether a carrier has a duty under the RLA to bargain with a union that admits it does not have the support of a majority of any craft or class of the carrier's employees' this dispute, Burlington Northern asserts, involves a pure question of statutory construction.

Thus, Burlington Northern concludes, because the authorities clearly show that Burlington Northern has no legal duty to bargain with ARSA and because this Court has jurisdiction to entertain the instant suit, plaintiff is entitled to summary judgment.

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[11] *In accord, Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327 n.3 (1959); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 207 (1944); *Tunstall* v. *Locomotive Firemen*, 323 U.S. 210, 213-14 (1944).

II. DEFENDANTS' ARGUMENT

ARSA's argument for summary judgment in its favor largely ignores Burlington Northern's assertion that ARSA is not the legal bargaining representative for the employees it claims to represent; instead, ARSA concentrates on the issue of whether this Court has jurisdiction to make such a determination.

In beginning its argument, ARSA notes:

> In seeking a judicial declaration that it need not treat with ARSA as representative of any of its employees, plaintiff attempts in effect to assert that there is some kind of a representation dispute. *ARSA's Memo in Support of Motion for Summary Judgment* at 15.

However, ARSA asserts, as mentioned hereinbefore,[12] there can be no representation dispute under the RLA where the dispute has not been instituted by either an employee of a carrier or by a labor organization. Thus, ARSA notes, there is no legally recognizable representation dispute in the instant case since the complaint is void of any facts showing that any employee or any labor organization claims that ARSA does not now represent the employees it purports to represent.

Furthermore, ARSA argues, even if the instant suit presented a recognizable representation dispute, this Court is without jurisdiction to resolve it. For nearly 30 years the rule has been firmly established that the NMB has exclusive jurisdiction over representation disputes that fall within section 2 Ninth of the RLA, *General Committee* v. *Missouri-K-T R. Co.*, 320 U.S. 323, 336-37 (1943). The only time that courts can exercise jurisdiction over representation disputes is when the NMB has acted in excess of its statutory authority under section

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[12] See footnote 8, *supra*.

2 Ninth (and ARSA notes that no such claim is or could be made here), *Railway Clerks* v. *Employees Ass'n*, 380 U.S. 650, 661 (1965).

Thus, ARSA concludes, because the complaint is premised upon a representation dispute which does not legally exist and over which this Court would have no jurisdiction even if it did exist, ARSA is entitled to summary judgment.

III. OPINION OF THE COURT

This Court is in agreement with ARSA that the instant complaint is premised upon a dispute which is, in reality, a representation dispute. The Court notes that in order to grant the relief sought by the Burlington Northern, this Court would have to make the following determinations:

(1) It would have to determine which of plaintiff's employees were within the crafts or classes of mechanical supervisors and technicians employed by the Burlington Northern;

(2) It would have to find that ARSA did not represent a majority of the employees within the crafts or classes designated by this Court; and

(3) It would have to hold that the merger automatically resulted in a decertification of ARSA as the bargaining agent for the employees that ARSA previously represented.

These three determinations are determinations that can only be made by the NMB; indeed, the Supreme Court has been quite specific in holding that federal courts are without jurisdiction to make determinations such as the first one set forth. In *Railway Clerks* v. *Employees Ass'n*, *supra*, the Court stated:

> In view of these considerations, we hold that the Board performed its statutory duty to conduct an

> investigation and designate the craft or class in which the election should be held and that it did so in a manner satisfying any possible constitutional requirements that might exist. Its determination, therefore, is not subject to judicial review. 380 U.S. at 668.

Consequently, because this Court is without jurisdiction to entertain representation disputes under the RLA, the complaint fails to state a claim upon which this Court can grant relief.

Accordingly, it is hereby ordered, adjudged and decreed that:

(1) Burlington Northern's motion for summary judgment is denied;

(2) ARSA's motion for summary judgment is granted; and

(3) NMB's motion for summary judgment is granted.

DATED: August 21, 1972

ENTER: /s/ William J. Bauer
Judge

APPENDIX F

Memorandum Opinion and Order of District Court, June 22, 1973 *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 71 C 2002

BURLINGTON NORTHERN, INC., a corporation
Plaintiff and Counter-defendant,

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION, *et al.*,
Defendant and Counter-plaintiff.

MEMORANDUM OPINION AND ORDER

This cause comes on the plaintiff and counter-defendant's motion to dismiss the counter-claim and the defendant, counter-plaintiff's motion for summary judgment on the issue of the counter-defendant's liability.

The plaintiff and counter-defendant, Burlington Northern, Inc., ("Burlington Northern") is a Delaware corporation, engaged in the business of transporting freight and passengers by rail in interstate commerce, and is a "carrier" as defined in Section 1 of the Railway Labor Act, 45 U.S.C. § 151.[1] The defendant and counter-plain-

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* Reported at 359 F. Supp. 1047.

[1] The plaintiff and counter-defendant was formed on March 2, 1970 by the merger of the properties and franchises of the Great Northern Railway Company ("Great Northern"), Chicago Burlington & Quincy Railroad Company (CB&Q), Northern Pacific Railway Company ("NP"), and Pacific Coast R.R. Co. ("PCRR"), and the lease by the surviving company of all properties owned, used, or operated by the Spokane, Portland & Seattle Railway Company

tiff, The American Railway Supervisors Association ("ARSA") is an incorporated labor organization with headquarters in Chicago, Illinois. The plaintiff initiated the instant action against ARSA and other defendants seeking, *inter alia*, a declaration that plaintiff is not required to bargain, arbitrate or otherwise treat ARSA as the representative of any of plaintiff's employees and an order enjoining ARSA from further prosecuting its demand for arbitration of the parties' disputes alleged herein.[2]

("SP&S") [Great Northern, CB&Q, NP, PCRR, and SP&S are hereinafter referred to as "component lines"]. The merger and lease were authorized by the Interstate Commerce Commission pursuant to Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5. *Great Northern Pac. & B. Lines, Merger*, 331 I.C.C. 288 (1967), aff'd., *U.S.* v. *U.S.*, 296 F.Supp. 853 (D.D.C. 1968), aff'd., *Northern Lines Merger Cases*, 396 U.S. 491 (1970). Prior to the merger, each component line was engaged in the business of transporting freight and/or passengers by rail in interstate commerce and was a "carrier" as defined in Section 1 of the Railway Labor Act. Upon the effective date of the merger, the component lines discontinued the transportation of freight and/or passengers by rail, ceased to exist as carriers, and ceased (except for SP&S) to exist as corporate entities. Upon the effective date of the merger, the employees of the component lines became employees of plaintiff Burlington Northern and were then intermingled and the railroad operations of the component lines were merged and integrated.

[2] More specifically, the plaintiff Burlington Northern sought the judgment of this Court:

"1. Declaring:

a. That plaintiff is not required to bargain or otherwise treat ARSA as the representative of any of plaintiff's employees;

b. That plaintiff is entitled to change the rates of pay, rules and working conditions of technicians and mechanical supervisors without bargaining with ARSA;

c. That plaintiff is not required to arbitrate, and ARSA is not entitled to demand arbitration of, the disputes alleged herein; and

d. That defendant National Mediation Board and the defendant members thereof cannot lawfully establish

On August 21, 1972 this Court held that it was without jurisdiction to entertain the instant complaint involving a representation dispute under the R.L.A.[3] See *Burlington Northern, Inc.* v. *American Railway Supervisors Association*, 350 F.Supp. 897 (N.D. Ill. 1972).

The only part of the instant action which remains is the defendant ARSA's counter-claim against the plaintiff Burlington Northern. The defendant and counter-plaintiff ARSA, in the counter-claim, seeks an order compelling Burlington Northern to submit the parties' disputes to

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an arbitration board or appoint a neutral member to arbitrate the disputes between plaintiff and defendant ARSA alleged herein;

2. Enjoining ARSA from further prosecuting its demand for arbitration of the parties' disputes alleged herein;

3. Enjoining defendant National Mediation Board and defendants George S. Ives, David H. Stowe and Peter C. Benedict from establishing an arbitration board or appointing a neutral member to arbitrate the disputes between plaintiff and defendant ARSA; and

4. Grant plaintiff such other and further relief as may be appropriate" (see Paragraph 17 of the complaint).

[3] More specifically, this Court stated:

"The Court notes that in order to grant the relief sought by the Burlington Northern, this Court would have to make the following determinations:

1. It would have to determine which of the plaintiff's employees were within the crafts or classes of mechanical supervisors and technicians employed by the Burlington Northern;

2. It would have to find that ARSA did not represent a majority of the employees within the crafts or classes designated by this Court; and

3. It would have to hold that the merger automatically resulted in a decertification of ARSA as the bargaining agent for the employees that ARSA previously represented.

These three determinations are determinations that can only be made by the NMB (National Mediation Board). . ." 350 F.Supp. at 904.

arbitration under the Burlington Northern merger protection agreement and an award of damages for Burlington Northern's alleged refusal to arbitrate.[4]

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[4] More specifically the counter-plaintiffs seek a judgment from this Court:

"1. Declaring:

a. That counter-defendant is required to submit the dispute it has with the counter-plaintiff concerning the interpretation and application of the employees merger protection agreement (Defendant's Exhibit 1) and specifically the dispute arising out of the refusal of the counter-defendant to take over and assume the contracts, schedules and agreements between the counter-defendant and the counter-plaintiff concerning rates of pay, rules governing working conditions, fringe benefits, rights and privileges pertaining thereto which were in effect at the time of the consummation of the merger and be bound by the terms and provisions thereof, subject to change in accordance with the provisions of the Railway Labor Act, as amended, to arbitration as provided for in Section 9 of the employees merger protection agreement (Defendant's Exhibit 1);

b. The National Mediation Board may establish an arbitration committee and appoint a neutral member thereof to arbitrate the dispute hereinabove described in sub-paragraph a, between counter-plaintiff and counter-defendant, in accordance with the provisions of the Employees Merger Protection Agreement (Defendant's Exhibit 1);

2. Enjoining the counter-defendant from further refusing to submit the dispute above described in paragraph 1a to arbitration as provided for in Section 9 of the Employees Merger Protection Agreement (Defendant's Exhibit 1);

3. Entering a judgment against the counter-defendant for damages to the counter-plaintiff and the employees of the counter-defendant represented by the counter-plaintiff in an amount of One Million Dollars ($1,000,000);

4. Awarding reasonable attorney's fees for the counter-plaintiff's attorneys and costs; and

5. Granting counter-plaintiff such other and further relief as may be appropriate" (Paragraph 16 of the counterclaim).

The plaintiff, counter-defendant Burlington Northern, in support of its motion to dismiss the counter-claim, contends:

1. On August 21, 1972 this Court ruled that the issues presented by the complaint in this case are within the exclusive jurisdiction of the National Mediation Board and therefore the Court lacks jurisdiction to determine those issues.

2. In its counter-claim, ARSA sought a contrary determination of the same issues. Thus, the counter-claim sought a judgment declaring that Burlington Northern is required to submit the parties' disputes to arbitration and sought an order requiring Burlington Northern to submit to such arbitration and to pay damages for failing to do so.

3. Accordingly, the Court's ruling that it lacks jurisdiction to determine the issues presented by the complaint is equally applicable to the only claim asserted in the counter-claim.

The defendant and counter-plaintiff ARSA, in support of its motion for summary judgment as to liability on the counter-claim, and in opposition to Burlington Northern's motion to dismiss contends that the Court has jurisdiction over the counter-claim and should adjudicate that Burlington Northern is liable to ARSA for damages.

It is the opinion of this Court that in accordance with this Court's prior ruling it does not have jurisdiction at the present time over the instant counter-claim because essential to the proper disposition of the counter-claim for damages is the resolution of the representation question presented by the instant complaint, which can only be determined by the National Mediation Board (NMB). See *Burlington Northern, Inc.* v. *American Railway Supervisors Association, supra.* Obviously, ARSA cannot recover damages for Burlington Northern's failure to rec-

ognize it as the representative of any Burlington Northern employees if ARSA is not entitled to recognition.

More specifically, the threshold question presented by ARSA's counter-claim for damages is whether the Burlington Northern must recognize ARSA as the bargaining representative of the employees that ARSA claims to represent. This Court has previously held that it lacks jurisdiction to determine that very question. Only the NMB can properly determine and resolve this representation dispute. *Burlington Northern, Inc.* v. *American Railway Supervisors Association, supra.*

Since the Court lacks jurisdiction to decide that ARSA does not represent the employees, it also lacks jurisdiction to decide that ARSA does represent the employees. Before claiming damages for non-recognition ARSA should obtain a determination by the NMB of the threshold question upon which damages are predicated, namely its right to recognition as a representative of Burlington Northern's employees. Thus the counter-claim should be dismissed.

Accordingly, it is hereby ordered that the plaintiff-counter-defendant's motion to dismiss the counter claim is granted.

ENTER: /s/ William J. Bauer
Judge

DATED: June 22, 1973.

APPENDIX G

Labor Protection Provisions from I.C.C. Decision and Order Approving Merger *

FINANCE DOCKET No. 21478

GREAT NORTHERN PACIFIC & BURLINGTON LINES, INC.—MERGER, ETC.—GREAT NORTHERN RAILWAY COMPANY, ET AL.

Decided November 30, 1967

From pages 276-279

EMPLOYEE PROTECTION

Under section 5(2)(c), we must give weight to, among other factors, the interest of the carrier employees affected by the proposed unification. Section 5(2)(f) provides that as a condition of our approval of any transaction under section 5(2), we "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." [15] Section 5(2)(f) further provides that notwithstanding any other provisions of the act, the carrier or carriers and the duly authorized representative or representatives of its or their employees may enter into agreements providing for the protection of employees.

In the *prior report* it was found that the merger would result in a net loss of about 5,200 jobs on the applicant

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* 331 I.C.C. 228, 276-279, 359-360.

[15] As found in the *Seaboard-Coast Line* case, employees affected are those of the carriers involved in the merger and most immediately affected thereby. Our discussion and conclusions herein should be viewed in that context.

railroads, and that through the so-called bumping process the number of employees affected would exceed that number. In that report, the finding that "substantial" hardship would be inflicted upon employees as a result of merger was a significant factor in the decision to deny these applications. Since then, the situation as to protection of employees has been considerably changed. At the time of the *prior report* applicants indicated their willingness to provide the protection of the *New Orleans* conditions (*New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, as modified in *Southern Ry. Co.—Control —Central of Georgia Ry. Co.*, 317 I.C.C. 557, 317 I.C.C. 729, and 320 I.C.C. 377). As noted above, applicants now have revised their estimate of the number of jobs to be abolished, and concomitantly have revised their labor protection costs. Whereas the *New Orleans* conditions were offered then, attrition conditions will now be provided. Under the former, the total cost of employee protection was estimated at $4.96 million, all chargeable to operating expenses and deductible in computing Federal income taxes.[16] Now, based on the agreements entered into since the *prior report* with the Engineers and Trainmen and expected to be reached with other crafts, applicants estimate the total cost of employee protection at $10.15 million, similarly chargeable to operating expenses.[17] Thus, while the costs of the labor protective conditions are greater than contemplated at the time of the *prior report*, so too are the protections offered employees somewhat improved.

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[16] At the then current income tax rates, only $2.38 million would have been borne by NuCo, and interest at 5 percent on that amount, or $119,084, was included in Study XIX as a charge against unification.

[17] Based on tax rates as of January 1, 1967, of this total labor cost $5.28 million would be borne by NuCo, and interest at 5 percent on this amount, or $264,051 is included in Study XIX in lieu of the prior figure.

The agreements entered into between applicants and the Engineers and Trainmen provide attrition-type protection [18] for employees, plus various monetary benefits, retirement allowances, and protection against loss from the sale of homes and the cancellation of unexpired leases. The stated purposes of the agreements are: (1) to assure employment and/or earnings to employees covered by the agreements, (2) to expedite the changes in services, facilities and operations resulting from the merger, and (3) to prescribe procedures by which existing agreements between the parties shall be modified and consolidated to conform with such operating changes. Under the agreements, NuCo is obligated to take into its employment all covered employees of Great Northern, Northern Pacific, Burlington and SP&S and no employee is to be deprived of his employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment. In addition, NuCo will assume and continue the employment relationship of employees on furlough or leave of absence. The agreement recognizes the right of NuCo to transfer work throughout the merged system and contemplates the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces. In lieu of the arbitration procedure prescribed by section 13 of the Washington Job Protection Agreement of 1936, disputes are to be settled by referral thereof to a Disputes Committee composed of one member

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[18] In *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 715, we stated that attrition means that "no reduction in force of employees shall occur other than principally by death, retirement, discharge for cause or resignation." For simplicity, the phrase "attrition protection" or "attrition agreement" will be used to reflect this concept.

from each party, and a neutral member to be selected by the parties, or in case of their disagreement by the National Mediation Board.

Under the agreements, "employees would receive guarantees and job assurances for the rest of their working lives * * *." As stated, applicants have indicated their willingness to enter into similar attrition agreements with all affected employees—both union represented and individual employees not represented by a union—whom we are required by law to consider when weighing the proposed transactions. All these employees then are free to enter into such separate agreements. After analyzing these agreements, we are convinced that the interests of carrier employees covered thereby will be adequately and fairly protected by the terms of these agreements. In fact, the protection thereby afforded, providing as it does job security as well as monetary benefits, could hardly have been achieved except for the merger. Under the terms of the last sentence of section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees covered thereby. As to them, therefore, we make no requirement for protection, but do find the agreement does not render the proposed transaction inconsistent with the public interest.

For any employees entitled to protection who do not enter into separate protective agreements, we must, under the first part of section 5(2)(f), provide a fair and equitable arrangement so that the transaction will not result in their being placed in a worse position with respect to their employment. Agreements of the character discussed above would provide the guaranteed benefits, and be fair and equitable. In the interest of uniformity and in view of applicants' willingness to extend attrition conditions to all employees, we require, as a condition to our approval of these transactions, the

attrition conditions the same as set forth in the agreements mentioned above, be applied to all affected employees who have not entered into separate agreements. In order that all such employees shall be informed of the protection being hereby afforded, NuCo will within 30 days of the date of our order herein be required to disseminate to them the terms of the agreements already reached, informing them at the same time that they are being afforded such protection.

We believe that the effect of attrition protection for all employees of the merged system will tend toward greater efficiency and higher morale among the employees and will thereby promote the national transportation policy in the development and maintenance of an adequate and effective transportation system. Cf. *United States* v. *Lowden*, 308 U.S. 225, (1939). Additionally, we here conclude that the hardship on employees, which in the prior report prompted, in part, our denial of these applications, has been alleviated.

From pages 359-360

34. NuCo shall be required to provide employees not now covered and to the extent contemplated under section 5(2)(f) of the act with the basic protection as particularly described in the contract entered into between applicants and the Brotherhood of Locomotive Engineers and Brotherhood of Railway Trainmen. NuCo shall apprise the affected employees of the protection provided herein, as more fully set out in this report.

APPENDIX H

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

Case No. R-4379

In the matter of

REPRESENTATION OF EMPLOYEES

of

BURLINGTON NORTHERN, INC.

Mechanical Department Foremen and/or
Supervisors of Mechanics

DISMISSAL

September 19, 1973

The services of the National Mediation Board were invoked by the American Railway Supervisors Association on March 28, 1973, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Mechanical Department Foremen and/or Supervisors of Mechanics, employees of the Burlington Northern, Inc.

At the time application was received, no certified bargaining agent represented these employees.

The Board assigned Mediator Joseph W. Smith to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board,

the mediator was instructed to conduct an election by secret ballot, using an agreed to eligible list to determine the employees' representation choice.

The following is the result of the election as reported by Mediator E. B. Meredith, who was assigned to count the ballots in this case and attested thereon by a party observer.

Number of Employees Voting:

	The American Railway Supervisors Association	Any Other Org. or Individual	Void Ballots	Number of Employees Eligible
Mechanical Department Foreman and/or Supervisors of Mechanics	139	9	5	569

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation.

On the basis of the investigation and report of election which shows that less than a majority of eligible employees cast valid ballots in the election, the National Mediation Board finds no basis for Certification and the application is therefore dismissed.

By order of the NATIONAL MEDIATION BOARD.

/s/ Rowland K. Quinn, Jr.
ROWLAND K. QUINN, JR.
Executive Secretary

APPENDIX I

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

Case No. R-4043

In the matter of

REPRESENTATION OF EMPLOYEES

of

BURLINGTON NORTHERN, INC.

Technical Engineers, Architects,
Draftsmen and Allied Workers

DISMISSAL

June 3, 1970

The services of the National Mediation Board were invoked by the Great Northern Railway Company Technical Employees Association to investigate and determine who may represent, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Technical Engineers, Architects, Draftsmen and Allied Workers, employees of the Great Northern Railway Company.

At the time application was received these employees were represented by the American Railway Supervisors Association.

During the course of the preliminary investigation of the application, the former Great Northern Railway Company merged with the former Spokane, Portland & Seattle Railway Company, Northern Pacific, Chicago, Burlington & Quincy and the Pacific Coast Railroad companies forming a single carrier known as the Burlington

Northern, Inc., effective March 3, 1970. (ICC Finance Docket No. 21-478 et al)

The Board finds that since the carrier known as the Great Northern Railway Company is no longer in existence, the application as presented is moot. Therefore, the application of the Great Northern Railway Company Technical Employees Association is hereby dismissed.

By order of the NATIONAL MEDIATION BOARD.

/s/ Thomas A. Tracy
THOMAS A. TRACY
Executive Secretary

APPENDIX J

In the Matter of REPRESENTATION OF EMPLOYEES OF THE NEW YORK CENTRAL RAILROAD CO.—YARDMEN (CONSISTING OF FOREMEN OR CONDUCTORS, HELPERS OR BRAKEMEN, SWITCHTENDERS, AND CAR-RETARDER OPERATORS)

Case No. R-690—Decided May 27, 1941

FINDINGS UPON INVESTIGATION

In accordance with Section 2, Ninth, of the Railway Labor Act, as amended, the Brotherhood of Railroad Trainmen (hereinafter referred to as the "Trainmen"), under date of July 2, 1940, invoked the services of the National Mediation Board to investigate an alleged representation dispute among employees constituting the craft or class of yardmen (consisting of foremen or conductors, helpers or brakemen, switchtenders and car-retarder operators) in the employ of the "New York Central Railroad System." The Trainmen explained that by "New York Central Railroad System" it meant the New York Central—Lines East, the New York Central—Lines West; the Cleveland, Cincinnati, Chicago & St. Louis Railway; the Michigan Central Railroad; the Toledo & Ohio Central Railroad; and the Boston & Albany Railroad, as together constituting a single carrier, the New York Central Railroad Co. (hereinafter referred to as the "Railroad Company"), the craft or class of whose yardmen constitute a single undivided unit entitled, under the Railway Labor Act, to designate a representative for the purposes of the Act.

The Switchmen's Union of North America (hereinafter referred to as the "Switchmen"), because of the fact that it represented yardmen in the service of the Railroad Company on some of its component lines or roads and at some of its yards, contested the request of the Trainmen.

The Board assigned Mr. P. D. Harvey, mediator, to make an investigation of the alleged dispute on the ground. It developed after conferences with the representatives of the Trainmen and the Switchmen that no agreement could be reached between them as to whether all of the yardmen together in the service of the Railroad Company should be considered the basis for representation within the meaning of the Railway Labor Act or whether the yardmen should be permitted to continue to designate representatives by separate parts of the Railroad Company substantially as reflected by the agreements covering yardmen in effect between the Switchmen and various component lines or roads of Railroad Company.

Because of the inability of the mediator to harmonize the views of the representatives of the Trainmen and the Switchmen on this question, the Board, after having concluded that a dispute over representation did in fact exist among the yardmen here concerned, ordered a public hearing to be held so as to give all interested parties opportunity to present pertinent data, evidence, and argument in support of their respective positions and to submit briefs. This hearing was held at the offices of the Board in Washington, D.C., on February 20 and 21, 1941. The contesting parties were represented by counsel. Representatives of the Brotherhood of Locomotive Firemen and Enginemen, and the Railway Employes' Department, American Federation of Labor, also appeared. A representative of the Railroad Company was present at the invitation of the Board for the purpose of giving such factual information bearing on the issue involved as the Board might request. Briefs were filed with the Board by counsel for the Trainmen and the Switchmen, and, in addition written statements were submitted on behalf of the Brotherhood of Locomotive Firemen and Enginemen, the Railway Employes' Department, American Federation of Labor, and the Order of Railroad Telegraphers.

ISSUES

The Trainmen contend that the various lines of roads constituting the Railroad Company are not separate and independent operating units or carriers as they were before becoming consolidated under the Railroad Company, but that such lines now constitute a single carrier, managed under a plan of consolidation by the Railroad Company, effected by acquisition through leases of the properties or by purchase of the capital stock of the companies owning the separate lines of road concerned and the integration of these separate properties and roads into a single railway transportation system controlled and operated by the Railroad Company; that this system as a whole is a single "carrier" within the meaning of the Railway Labor Act; and that, in view of Sections 1, Sixth, and 2, Fourth and Ninth of the Act, the Board is bound to include in the eligible list all the employees of a craft or class of such a carrier for the purpose of determining their representative.

The Switchmen contend that various separate properties or lines operated by the Railroad Company are separate carriers for the purpose of representation within the meaning of the Railway Labor Act; that the Act permits the Board, in its discretion, to divide a "carrier" into geographical areas, separate lines, or regions and that the employees embraced within a class or craft in the service of the Railroad Company of each such line or region constitute separate crafts or classes of employees for purpose of representation.

ARGUMENT OF PARTIES

The arguments of the parties as presented in their briefs are quoted in part as follows:

Brief of Brotherhood of Railroad Trainmen
(pp. 18 and 19)

1. *Summary of ideas involved.*—There is but one statutory interpretation of the term "Carrier" and that is a finding that it is a single operating unit, covering territorially, the Company and its directly controlled leased lines, governing employees in their relations with management.

2. The Interstate Commerce Commission has heretofore classified the employer unit which was the *cause* which resulted in the Carrier filing a single unified operating report (result) such finding being supported by substantial evidence, is conclusive on courts and this Board.

3. The Board in a long line of decisions has necessarily followed the principle of this interpretation.

4. Chaos, confusion, and unrest would follow any adverse or conflicting interpretation.

5. The status quo should be maintained.

6. A basic principle of the Act is that employees *be* represented to protect them and the public. *They are well represented.*

7. Majority representation for collective bargaining is the heart and core both of unionism and democratic rule.

8. The Board has held present agreements are not altered by a change in representation.

9. An employee joining a group impliedly assents to yield loyalty to any *group which may become* the majority.

10. The cause of unrest and the dispute, shown to exist at Detroit, and Toledo, should be removed, if possible in its early stage, by certification.

11. The majority is substantial in numbers.

12. Minority groups are protected by the Act.

13. The issue covers only *legislative* bargaining, leaving all *other matters* unchanged. No inequality results to the minority which always has a chance to become a majority.

14. The evidence abundantly supports a certification.

The Trainmen also referred to decisions of the Board in representation cases R-148, R-155, R-229, R-248, and R-263, summaries of which are given later in the opinion.

Brief of the Switchmen's Union of North America (pp. 3 and 4)

1. The position of the Brotherhood of Railroad Trainmen is opposed to the basic principles of the Railway Labor Act.

2. No bona fide representation dispute exists among the employees in question.

3. Yardmen employed on the Michigan Central at and west of Detroit and on certain yards of the New York Central—Lines West, constitute separate crafts or classes of employees.

4. The properties here involved are separate carriers within the meaning of the Railway Labor Act.

5. The position of the Brotherhood of Railroad Trainmen is not one which should appeal to the statutory discretion of the Board.

The Brotherhood of Railroad Trainmen is well aware that it controls a clear majority of all of the yardmen of the system. (P. 2, par. 3.)

It appears, therefore, that this proceeding is in effect an effort of one standard labor organization to oust another similar organization from a jurisdiction long held by it and honorably exercised. There is no pretense that the Switchmen's Union of North America has been derelict in its duties or that the Brotherhood of Railroad Trainmen is capable of im-

> proving the caliber of representation now secured by these employees. The only intent is to make use of a technical opportunity which it claims is afforded by certain provisions in the Railway Labor Act for the purpose of strengthening one organization at the expense of the other. (P. 3, par. 2.)

The Switchmen also cite previous representation certifications in cases R-113, R-161, R-452, R-460, and R-570, applicable to segments of the New York Central Railroad, which have been issued by the Board, contending that they should serve as precedents in deciding the controversy now before the Board. Comments upon these cases will appear later in the opinion.

STATEMENTS SUBMITTED BY INTERVENING ORGANIZATIONS

The Brotherhood of Locomotive Firemen and Enginemen, intervener, in its statement contends:

> *First*, does the Railway Labor Act *require* the Board to promote system-wide classification of employees? That is to say, does the Act make it the duty of the Board to group all the employees of a railroad system engaged in the same type of work into one class or craft for representation purposes?
>
> *Second*, if the Railway Labor Act does *not* require a system-wide classification of employees, does the Railway Labor Act authorize or permit the National Mediation Board to change the existing classes or crafts of employees as the same are embodied in working agreements, and foster or promote system-wide classification of employees, without regard for the wishes of the employees involved?
>
> *Third*, if the Railway Labor Act does in fact vest the Board with such authority, would it be advisable as being in the best interests of the employees for the Board to promote such a policy of classification? (P. 4.)

> Sec. 2, Ninth, provides that the National Mediation Board when investigating a representation dispute may conduct an election to determine the choice of a majority for a representative and "in the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules governing the election." The authority thus vested in the Board to designate who may participate in an election cannot reasonably be construed as an authorization to the Board to establish or define what shall constitute classes or crafts of employees. (Pp. 5 and 6.)

This intervener also refers to two cases decided by the Federal courts, dealing with the question as to what is a craft or class.[1] The intervener interprets these decisions as authorizing or even requiring the splitting of a craft or class of employees on a carrier, if in fact such separate groups ordinarily composing a craft or class had already become established historically or it should appear desirable to so establish them in the view of desires of a majority of the employees constituting such separate divisions of a craft or class.

The Railway Employes' Department of the American Federation of Labor, another intervening party, in its statement contends that it is within the power of the Board to recognize subdivisions of a class or craft upon a given carrier as determined, for example, by the scope of agreements already in effect on a carrier. The Department further asserted that serious difficulties might arise if existing groupings of employees on this basis were disturbed.

The Order of Railroad Telegraphers, in letters to the Board dated April 10 and 14, 1941, stated it did not

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[1] *B. R. T.* v. *National Mediation Board*, 88 Fed. (2) 757 (1936). *Brotherhood of Railway and Steamship Clerks, Freight Handlers, etc.* v. *Nashville, Chattanooga & St. Louis R. R. Co.*, 94 Fed. (2) 97 (1937).

wish to intervene, but did wish to express opposition to the New York Central Railroad Co. and its subsidiaries being considered together as a single carrier unit for representation purposes under the Railway Labor Act, if such a determination would form a precedent to affect The Order of Railroad Telegraphers in any jurisdictional dispute which may arise in the future between the Order and any other organization.

In addition to the briefs and statements of the parties and interveners above referred to, the exhibit statement of Mr. J. G. Walber, vice president of the Railroad Company, was considered.

FINDINGS OF FACT

Upon the record before it, the National Mediation Board finds as follows:

1. The New York Central Railroad Co. is an independent carrier by railroad which operates approximately 11,070 miles of road[2] and is a unification of many separate corporations. In addition to the line directly owned by the New York Central Railroad Co., which is approximately 3,737 miles of road, it operates all of the remaining mileage identified with it mostly through long-term leases or majority stock ownership. Among the railroad companies thus operated are the Boston & Albany Railroad Co., which owns 275 miles of road; the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., which owns 2,324 miles of road; The Michigan Central Railroad Co., which owns 1,085 miles of road; and The Toledo & Ohio Central Railway Co., which owns 653 miles of road. Each of these lessor companies has long-term leases on a number of smaller railroads which are now operating under the lease between the intermediate

[2] I. C. C. Statistics of Railways of the United States, 1938, pp. 220 and 221. I. C. C. Finance Docket 5790, vol. 150, pp. 278-329.

lessor company and the New York Central Railroad Co. The New York Central—Lines East and the New York Central—Lines West have no corporate operating identities but are merely operating regions of the New York Central Railroad.

The leases between the New York Central Railroad Co. (the parent company) and the Michigan Central Railroad Co. and Cleveland, Cincinnati, Chicago & St. Louis Railway Co., are for 99 years and became effective February 1, 1930. The lease between the parent company and the Boston & Albany Railroad Co. is also for 99 years and became effective July 1, 1900. The Toledo & Ohio Central Railway Co. was leased by the parent company January 1, 1922, which arrangement is to continue for the corporate existence of the lessor company. The parent company owns a controlling stock interest in all of the lessor companies.

2. The number of yardmen employed by the Railroad Company is approximately 6,087, which, according to agreements on file in the offices of the National Mediation Board, are now represented on the following portions of the Company's line by the contesting organizations here involved:

	Switchmen's Union of North America	Brotherhood of Railroad Trainmen
	Yards at—	
New York Central—west of Buffalo	Dunkirk, Ohio. Erie, Pa. Ashtabula, Ohio. Ashtabula Harbor, Ohio. Cleveland, Ohio. Cleveland passenger yard. Elyria, Ohio. Sandusky, Ohio. Toledo passenger yard. Detroit, Mich. West Detroit, Mich. Adrian, Mich. Monroe, Mich. Fort Wayne, Ind. Grand Rapids, Mich. Jackson, Mich. Kalamazoo, Mich. Lansing Yards, Mich.	Youngstown, Ohio. Sharon, Pa. Elkhart, Ind. South Bend, Ind. LaPorte, Ind. Alliance, Ohio. Minerva, Ohio. Kankakee, Ill. Lyons Yards, Ill.
Michigan Central R. R.	All yards west of Detroit River, including South Bend transfer crews.	All yards east of Detroit River.
New York Central—east of Buffalo	None.	All yards.
Toledo & Ohio Central	None.	All yards.
Cleveland, Cincinnati, Chicago & St. Louis Ry.	None.	All yards.
Boston & Albany R. R.	None.	All yards.

3. The number of yardmen employed on the various lines of the Railroad Company as reported for the middle of November 1940 by the management to the Interstate Commerce Commission, is as follows:

	New York Central Lines—East	New York Central Lines—West	Toledo & Ohio Central	Michigan Central	Cleveland, Cincinnati, Chicago & St. Louis	Boston & Albany	Total
Yard conductors, including car-retarder operators	568	337	63	282	216	65	1,531
Yard brakemen	1,413	854	171	725	616	134	3,913
Switchtenders	300	171	11	65	56	40	643
Total	2,281	1,362	245	1,072	888	239	6,087

4. The number of signed authorizations from yard conductors, including car-retarder operators, yard brakemen, and switchtenders, submitted to the Board by the Brotherhood of Railroad Trainmen is as follows:

	New York Central Lines—East	New York Central Lines—West	Toledo & Ohio Central	Michigan Central	Cleveland, Cincinnati, Chicago & St. Louis	Boston & Albany	Total
Authorizations	2,129	774	374	479	779	214	4,749

5. Insofar as the train and engine service employees of the Railroad Company are concerned, they are covered by separate agreements for the New York Central —Lines East; the New York Central—Lines West; the Toledo & Ohio Central; the Cleveland, Cincinnati, Chicago & St. Louis; the Michigan Central; and the Boston & Albany. In addition, there are train and engine service basic wage rates and rules agreements confined solely to employees concerned on the Illinois Division of the New York Central.

The territorial scope of agreements covering employees represented by The Order of Railroad Telegraphers is similar to that of train and engine service employees in that there are separate basic agreements covering the New York Central—Lines East, the New York Central —Lines West, and also the Toledo & Ohio Central. The agreements held by the Brotherhood of Railroad Signalmen of America have a slightly different territorial scope. There is only one signalmen's agreement covering the New York Central—Lines East, and another covering the New York Central—Lines West, including the Toledo & Ohio Central. For the employees represented by both the Order of Railroad Telegraphers and the Brotherhood of Railroad Signalmen of America there are separate agreements covering the Boston & Albany; Cleveland, Cincin-

nati, Chicago & St. Louis; and the Michigan Central respectively.

The Railroad Yardmasters of North America held three agreements covering yardmasters on the New York Central. One covers yardmasters on the Lines East, the second covers the Lines West, and the third covers the Michigan Central. The yardmasters on the Toledo & Ohio Central are under an agreement held by the Trainmen. The yardmasters on the Boston & Albany are not covered by a labor agreement, and on the Cleveland, Cincinnati, Chicago & St. Louis, there is a yardmasters' agreement in effect with the Big Four Yardmasters' Association.

Agreements applicable to other employees of the company have still a different territorial scope. The crafts or classes of employees represented by the seven shop craft organizations which function through the Railway Employes' Department, A. F. of L., the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, the Brotherhood of Maintenance of Way Employees, and American Train Dispatchers' Association, have agreements covering the employees on Lines East and Lines West of the New York Central, as well as Ohio Central Lines. For the other lessor companies; namely, the Boston & Albany, the Cleveland, Cincinnati, Chicago & St. Louis, and the Michigan Central, however, these organizations have separate agreements covering the crafts or classes of employees which they represent.

For employees in the dining car service there is one agreement covering all stewards on the entire Railroad Company. For cooks and waiters there are three agreements; one of these covers cooks and waiters on the Boston & Albany, the other cooks and waiters on the New York Central—Lines East, and the third these same

employees on the New York Central—Lines West, the Cleveland, Cincinnati, Chicago & St. Louis, and the Michigan Central.

6. In the operation of the Railroad Company, common executives serve both the New York Central and the subsidiary companies and coordinate activities where the use of more than one part or line of the system is involved. For instance, the executive vice president coordinates the activities of the mechanical and maintenance of way departments in order to secure the most efficient use of the shops and uniformity of standards and practices. Train service coordination is subject to the jurisdiction of the managers of Passenger Transportation and Freight Transportation. These officials plan and supervise the through passenger and freight service respectively affecting all of the lines.

Exemplary of the coordination of the work performed on the various properties is the fact that the jurisdiction of the operating superintendent at Toledo includes the entire Toledo terminal in which is included portions of the Michigan Central, the New York Central—Lines West, and the Toledo & Ohio Central. The superintendent of the Western Division has jurisdiction not only over the Illinois Division of the New York Central—Lines West, but also over the Western Division of the Michigan Central, the Michigan Central yards in Chicago, and the Cleveland, Cincinnati, Chicago & St. Louis yards at Danville, Ill. The timekeeping department, which handles pay rolls for New York Central—Lines West, also performs this function for the Michigan Central, the Cleveland, Cincinnati, Chicago & St. Louis, and the Toledo & Ohio Central, and is located at Detroit, Mich. Pay rolls for New York Central—Lines East, and the Boston & Albany are prepared in Utica, N. Y.

7. Negotiations between management and representatives of the employees are subject to the general super-

vision of the vice president—personnel, whose principal function is to serve in an advisory capacity to the responsible officials of the different properties. In some cases, however, the vice president—personnel has participated in actual negotiations for changes in rules or working conditions applicable only to the Michigan Central or the Cleveland, Cincinnati, Chicago & St. Louis.

Because of the changes and gradual extension of the jurisdiction of the several bureaus which handle employee grievances at various locations on the Railroad Company, it has been necessary for the chairman of the general grievance committee of the Trainmen on the New York Central—Lines West, to handle his cases with five separate bureaus located respectively at Chicago, Cleveland, Cincinnati, Detroit, and Syracuse. In some cases, the handling of grievances on the property by the employees has been concluded with the bureau or the vice president located at the particular point. In other cases the employees have carried the handling of grievance cases to the vice president—personnel as the highest officer of the Company designated to handle such disputes, before submitting them to the National Railroad Adjustment Board.

8. There have been several instances of merging of seniority rosters of yardmen in the service of the constituent lines or companies of the parent company. One such instance is where the rosters of yardmen on the Michigan Central were set behind the rosters of the yardmen on the New York Central west of Toledo. As a result any new yardmen hired thereafter would have seniority on both the New York Central and the Michigan Central. Similarly, New York Central yardmen were included in the rosters of Michigan Central yardmen located at Detroit, Lansing, and Jackson, Mich.

9. Gradually over a number of years and especially since 1935, engine numbers on the Cleveland, Cincinnati,

Chicago & St. Louis locomotives have been changed to correspond with New York Central locomotive numbers. Similarly, the numbers on box cars and other equipment including supply cars that do not leave the lines of the Cleveland, Cincinnati, Chicago & St. Louis have had their numbers changed to correspond to New York Central numbers. Locomotives and cars are exchanged between the New York Central and the Cleveland, Cincinnati, Chicago & St. Louis with no per diem being charged for the cars.

DISCUSSION

The Railway Labor Act defines the term "carrier" as follows:

> Section 1, First:
>
> The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier."

The following provisions of the statute are directly applicable to the case under consideration:

> Section 1, Sixth:
>
> The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Section 2, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

Section 2, Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its service, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of the Act. * * * In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election * * *.

Since it has been shown that the Railroad Company, with its subsidiaries is a single carrier in fact under the Railway Labor Act, the Board now reaffirms the conclusions reached by it as to the legal consequences of such a fact as announced in its First Annual Report for the fiscal year ended June 30, 1935.

> What is a carrier?—Although the term "carrier" is clearly defined in the Act, questions have arisen in connection with representation disputes which made it necessary for the Board to interpret its

meaning. Where a railroad system is composed of a number of subsidiary corporations, employees have been in dispute as to whether one vote should be taken of a craft on the whole system or whether the subsidiary corporations are carriers within the meaning of the Act whose employees are entitled to separate representation. The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own pay roll and seniority rosters, it is a carrier as defined in the Act, and its employees are entitled to representation separate from other carriers who may be connected with the same railroad system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies. (P. 22, First Annual Report, National Mediation Board.)

The above statement as to the application of the law to the subject of representation has been followed since its first announcement and has consistently been adhered to by the Board in representation cases where the parties were in dispute on this question, to some of which the Trainmen give reference. The following brief review of the more important cases acted upon by the Board since 1934 confirms this observation.

R-74. On November 15, 1934, the Switchmen invoked the services of the Mediation Board, advising that a dispute existed as to representation of switchmen employed in the Buffalo and Cleveland yards of the Nashville, Chattanooga & St. Louis Railroad. The Board denied its request, contending that the two yards could not be separated but that all of the yards of the Nashville, Chattanooga & St. Louis Railroad which reports to the Interstate Commerce

Commission as a carrier, would have to be included in any representation dispute under Section 2, Ninth, of the Act.

R-101. On December 11, 1934, the Trainmen invoked the services of the Board in a representation dispute among yardmen employed by the Chicago & Eastern Illinois Railway Co. The carrier had an agreement with the Switchmen covering yardmen and contended that for a great number of years it had had separate contracts in effect with the two organizations covering certain portions of the railroad and that it would not agree that representation of yardmen should be determined by a vote of all the yardmen on the railroad when advised that a dispute existed covering representation of yardmen in the Chicago terminal only. The Board, however, under its interpretation of the Act, voted all the yardmen in service of the carrier, and under date of May 18, 1935, issued a certification that the Trainmen as a result of the election was authorized to represent the employees of the Chicago & Eastern Illinois Railway Co.

R-204. On October 11, 1935, the Switchmen invoked the services of the Board in representation dispute involving yardmen employed by the Chicago Great Western Railroad. The carrier advised that it had had contracts with the Switchmen covering yardmen in certain yards on the property; that it had not received a request from either organization to extend contracts to include yards where the other organization then held the contract, and it assumed that the dispute was one between the Switchmen and the Trainmen. However, the Board ordered an election and on December 24, 1935, issued a certification designating the Switchmen as representative

of all yardmen employed by the Chicago Great Western Railroad, as a result of the election.

R-148. Invocation filed by the Switchmen for representation of all yardmen on Delaware, Lackawanna & Western. At that time the yardmen at some points were represented by the Switchmen and at others by the Trainmen. All yardmen on the entire property were voted and the result favored the Trainmen.

R-155. Invocation filed by the Trainmen for representation of all yardmen on the Lehigh Valley Railroad. It held representation for all yardmen of the carrier except at Buffalo where the Switchmen held representation. After investigation the Board ordered all yardmen of the entire carrier to be voted. Results of the election favored the Trainmen and they were certified as representative.

R-229. Involving Soo Line yardmen is similar to some of the other cases cited by the Trainmen. At the time of the invocation it represented all of the Soo Line yardmen except those employed in Chicago, which were represented by the Switchmen. The vote was conducted over the entire system.

R-248. Invocation by Brotherhood of Maintenance of Way Employees to represent all maintenance of way employees on the Nashville, Chattanooga & St. Louis. It represented all employees of this craft or class on the carrier except those on the Clover Leaf district. Because there were only 477 employees on that district and on the remaining districts there were approximately 1,600 employees, the Board ruled there can be no doubt of the majority. Accordingly the Brotherhood of Maintenance of Way Employees was certified for the entire carrier.

R-263. In this case the Trainmen applied for representation of stewards on the New York Central Railroad, comprising Lines East and West, the Cleveland, Cincinnati, Chicago & St. Louis and the Michigan Central. The Boston & Albany was not included because the Trainmen already represented the stewards on that line. Vice President Walber of the carrier advised that dining cars were operated on the Boston & Albany as a separate railroad. The election was held covering all the lines listed in the application regardless of some protests from the Hotel and Restaurant Employees Association which held there was no dispute on New York Central—Lines West. A hearing at which both sides presented evidence indicated to the Board that its action in conducting the election was proper.

Neither the Trainmen nor the Switchmen contended in any of these cases that a system election of the railroad should not have been held because of existing contracts for specific yards then in effect with each of the organizations concerned.

In another case (R-100), where the Railway Employes' Department, A.F. of L., invoked the services of the Board in a representation dispute among Long Island Railroad shop craft employees, the Pennsylvania Railroad argued that for a number of years one agreement had been in effect covering the shop employees of the Pennsylvania and Long Island Railroads. The Board held that a separate vote should be taken of Long Island shopmen for the reason that the Long Island Railroad was a separate carrier within the meaning of the Railway Labor Act, since it reports separately to the Interstate Commerce Commission.

To recognize that the scope of agreements in effect in 1934 or since should be controlling in arriving at what

constitutes a craft or class of employees would in many instances be contrary to the provisions of law recognizing "majority rule" and would perpetuate representation on the basis of minorities.

The Switchmen refer to five previous representation certifications applicable to segments of the Railroad Company, which have been issued by the Board, as supporting their view that the Board possesses discretion under the law to make such subdivisions. The following summaries give the facts briefly as regards the five certifications cited by the Switchmen.

R-113. *Order of Railway Conductors* v. *Trainmen.* (Invocation by Order of Railway Conductors for representation of yard conductors, car-retarder operators, and switchtenders, employees of Cleveland, Cincinnati, Chicago & St. Louis Ry.) The Board raised the question with Order of Railway Conductors as to the inclusion of the New York Central, but acquiesced in Order of Railway Conductors' claim that the Cleveland, Cincinnati, Chicago & St. Louis was entitled to consideration as an independent carrier, there being no disagreement between the contesting organizations on the question.

R-161. *Railroad Yardmasters of North America* v. *Trainmen.* (Invocation by Railroad Yardmasters of North America for representation of yardmasters on Ohio Central Division, New York Central—Lines West.) After investigation was under way, Railroad Yardmasters of North America requested an enlargement of its invocation to include all employees assigned as yardmasters on all New York Central—Lines West. The Board did not grant the request but advised Railroad Yardmasters of North America that the only carrier involved in the dispute was the Ohio Central Division. There was no

disagreement between the contesting organizations as to what constituted a "carrier" in this dispute.

R-452. *Trainmen* v. *Order of Railway Conductors.* (Invocation by Trainmen for representation of road conductors on the Boston & Albany R. R.) The question of whether Boston & Albany is a separate carrier was not raised and both parties agreed upon the list of eligibles.

R-460. *Order of Railway Conductors* v. *Trainmen.* (Invocation by Order of Railway Conductors for representation of road brakemen, flagmen, and baggagemen on the Boston & Albany R. R.) The question of whether the Boston & Albany is a separate carrier was not raised and both parties agreed upon the list of eligibles.

R-570. *International Brotherhood of Firemen, Oilers, etc.* v. *International Union of Operating Engineers and Brotherhood of Maintenance of Way Employees.* (Invocation by International Brotherhood of Firemen and Oilers for representation of powerhouse employees and railway shop laborers of the Boston & Albany R. R.) Dispute arose on question of occupation to be included in eligible list. No question was raised as to whether the Boston & Albany is a separate carrier.

With reference to the argument of the Switchmen based on the issuing of certificates of representation applying only to the employees in the service of a particular territorial division, region, or part of the Railroad Company, the Board must again direct attention to the circumstances that in those cases eligible lists had been agreed upon between the contending parties. In none of these cases was there a controversy over the issue of law as now raised in this case.

Indeed with reference to the New York Central Railroad Co. itself in answer to a letter of Mr. Walber, with reference to case R-161, the Board wrote as of February 17, 1937, as follows:

> It has been the view of the Board that where a dispute exists within a class or craft, the law gives us no discretion but to make a determination of choice of representative for the entire class or craft for the entire railroad involved regardless of presently existing agreements, unless all parties to the present dispute agreed otherwise. The controlling ruling in this regard was made in the Nickel Plate case where the Switchmen's Union of North America sought to take over the representation of the men employed in the Buffalo and Cleveland yards. I am attaching a copy of our ruling in that matter. Of course, all the parties can agree to divide up the system for the purpose of separate agreements but if any one dissents from that view the determination must be made for the entire group and the entire system.

As the Board views the subject under consideration, it feels bound to conclude that no issue has been raised in this case as to what is a craft or class under the Railway Labor Act. There is no dispute that the class or craft of "yardmen" embraces foremen or conductors, helpers or brakemen, switchtenders, and car-retarder operators. The issue actually raised is simply a question as to whether this craft or class of "yardmen" may be broken into separate groups on the Railroad Company with a resulting right in any group to demand separate group representation. In the two court cases referred to (*B. R. T.* v. *National Mediation Board*, 88 Fed. (2) 757, and *Brotherhood of Railway & Steamship Clerks, etc.* v. *Nashville, Chattanooga & St. Louis R. R. Co.*, 94 Fed. (2) 97), the question before the courts involved the subject of what constituted a class or craft but did not

involve the splitting of a well recognized craft or class of employees essentially along geographical lines; i.e., by yards, divisions, subsidiary roads or companies, or regions of a parent operating company.

In further elaboration of its opinion on the subject as given in the First Annual Report, the Board is of the view that the idea of collective bargaining with a carrier denotes the collective participation of all the carrier's employees included in a single craft or class in its negotiations with the carrier by the method of representation. The word "collective" denotes singleness of agency in the same sense as the phrase "e pluribus unum" symbolizes the national unity of the States. It connotes not a part or parts of a subject but a collection of all the parts into one body, which applied in the case before us, means singleness of representation with a single carrier. On this point the Act seems literally definite as it reads:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act.

Note that the Act speaks of a majority of a craft or class determining "who shall be the representative" (not the representatives). The subjects "craft or class" and "representative" are both given in the singular number.

The Board does not undertake to discuss the relative advantages or disadvantages which may inhere in single or divided representation respectively. Doubtless serious arguments may be made both for and against each method. The Act leaves the Board in no doubt that Congress had in mind single representation for each craft or class on each carrier when enacting it; and that had the Congress thought of subdivisions of a craft or class or of a carrier as desirable methods of representation it would have made provision for their use.

Finally, the Board concludes as a matter of law that the Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion.

CONCLUSION

The National Mediation Board, in view of all the evidence before it and the arguments presented to it in this case, has reached the conclusion that, since the New York Central Railroad Co. and all of its operated subsidiaries, including the Boston & Albany Railroad Co.; the Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; the Michigan Central Railroad Co.; and the Toledo & Ohio Central Railway Co., is a single carrier within the meaning of and subject to the Interstate Commerce Act as established by the Interstate Commerce Commission, and so also constitutes a single carrier for the purposes of the Railway Labor Act, all of the employees of any given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the Railway Labor Act.

The mediator assigned to the investigation of this dispute will therefore proceed accordingly with the completion of his duties in connection with the Board's investigation of this dispute. That is to say, he shall regard as the proper basis for the representation of the yardmen in the service of the entire New York Central Railroad Co. all of the yardmen in such service.

APPENDIX K

In the Matter of REPRESENTATION OF EMPLOYEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY --YARDMASTERS

Case No. R-1826—Decided May 28, 1947

CERTIFICATION

The services of the National Mediation Board were invoked by the Railroad Yardmasters of America to investigate and determine who may represent yardmasters employed by the Denver & Rio Grande Western Railroad Company, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Brotherhood of Railroad Trainmen.

The Board assigned Mr. Frank P. Douglass, Board Member, to investigate. During the course of the investigation the Brotherhood of Railroad Trainmen contended that yardmasters of the former Denver & Salt Lake Railroad Company should not be included in the election. An examination of the records shows that the Denver & Rio Grande Western Railroad has been authorized by the Interstate Commerce Commission, effective April 11, 1947, to take over and operate the Denver & Salt Lake Railroad and that the latter is now actually being operated as a part of the Denver & Rio Grande Western Railroad. Under these circumstances and following the principles laid down by the Supreme Court in the New York Central Switchmen's dispute (R-690) the Board held that the two properties in the instant case are a single carrier for representation purposes. After finding that a dispute existed among the employees concerned, the Board

directed the mediator to conduct a U. S. Mail election to determine their choice, using an eligible list prepared by him from the carrier's records.

Following is the result of the election as reported by the mediator and attested to by representatives of the contesting organizations who acted as observers.

Number of employees voting:

	For Railroad Yardmasters of America	For Brotherhood of Railroad Trainmen	Number Employees Eligible to Vote
Yardmasters	29	17	50

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the Railroad Yardmasters of America has been duly designated and authorized to represent Yardmasters employed by the Denver & Rio Grande Western Railroad Company, for purposes of the Railway Labor Act.

By order of the National Mediation Board,

ROBERT F. COLE
Secretary

APPENDIX L

In the Matter of REPRESENTATION OF EMPLOYEES OF THE NEW YORK CENTRAL RAILROAD CO. (NEW YORK CENTRAL R. R. CO.; MICHIGAN CENTRAL R. R.; AND CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY.)—DINING CAR STEWARDS

Case No. R-263—Decided January 23, 1937

CERTIFICATION

The services of the National Mediation Board were invoked by the Brotherhood of Railroad Trainmen to settle a dispute as to who may properly represent dining car stewards, employees of the New York Central System; New York Central Railroad Co.; Michigan Central Railroad; and Cleveland, Cincinnati, Chicago & St. Louis Railway, as provided by Section 2, Ninth, of the Railway Labor Act, as amended.

The Board assigned P. D. Harvey, mediator, to investigate and, after finding that a dispute existed among the employees in question, directed him to take a secret ballot to determine their choice.

Following are the results of the election as reported by the mediator:

Number of employees voting for contesting organizations:

	For Brotherhood of Railroad Trainmen	For Dining Car Employes' Union Local 351	Void ballots	Number of employees eligible to vote
Dining car stewards	73	17	2	104

The Dining Car Employes' Union Local 351, Hotel and Restaurant Men's International Alliance, protested the holding of an election on the New York Central Sys-

tem contending that they held an agreement covering the stewards employed on the New York Central Lines (West), that there was no dispute among said stewards and that they were not contending to represent the stewards employed on the New York Central Lines (East).

In view of this protest the Board designated Chairman Carmalt to hold a hearing at the office of the Board in Washington, D. C., on January 9, 1937.

The hearing was attended by representatives of the contesting organizations. At the hearing the representative of the Dining Car Employes Union, Local 351, stated that during the time they were organizing stewards on the New York Central Lines (West) an effort was made to affiliate with the Brotherhood of Railroad Trainmen. However, the Brotherhood at that time did not undertake to represent stewards. The employees concerned, therefore, organized a separate local of the Hotel and Restaurant Men's International Alliance, and, with the cooks and waiters as part of the group, negotiated an agreement with the management in 1935. The representatives of the Brotherhood of Railroad Trainmen stated that their organization did not begin to accept dining car stewards as members until after the Brotherhood's Convention at Cleveland in 1935.

The hearing further revealed that the services of the Board had been invoked by the Brotherhood to adjust a representation dispute involving *all* the stewards employed by the New York Central System; that the investigation conducted by the mediator prior to the election revealed that the dispute did involve all the employees of the New York Central System on the lines east as well as on the lines west; and that under the law the Board, in adjusting representation disputes, has no discretionary powers to divide employees for election purposes along regional lines, as for example the lines east and the lines

west of the New York Central. The parties agreed that the dining car stewards constituted a separate craft or class under the law.

In view of these facts, it is necessary to decide that the election as held in this case; i.e., on a system basis, was properly conducted.

On the basis of the investigation conducted by the mediator, the report of the election, and the hearing held by Chairman Carmalt, the National Mediation Board hereby certifies that for the purposes of the Railway Labor Act the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the dining car stewards on the New York Central System.

APPENDIX M

In the Matter of REPRESENTATION OF EMPLOYEES OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD—SWITCHMEN (BUFFALO AND CLEVELAND YARDS)

Case No. R-74—Decided January 31, 1935

The services of the National Mediation Board were invoked on November 15, 1934, by the Switchmen's Union of North America, advising that a dispute existed as to representation of switchmen employed in the Buffalo and Cleveland Yards of the New York, Chicago and St. Louis Railroad. Following the invocation of the Board's services an investigation was made by a representative in the field, and the Board also made an independent inquiry into this matter of representation.

These inquiries revealed the fact that a system contract now exists on this property with the Brotherhood of Railroad Trainmen covering the switchmen in all the yards. The Switchmen's Union of North America now proposes that the property and the craft or class of employes be split so that the two yards in Buffalo and Cleveland be considered separate units for representation purposes and for making agreements with the carrier.

Section 2, Ninth, of the amended Railway Labor Act under the authority of which the National Mediation Board decides representation disputes among employes, provides that "a majority of any class or craft of employes shall have the right to determine who shall be the representative of the craft or class . . ." Since the whole craft or class of employes engaged in switching service for this carrier now work under one agreement presumably made through representatives of a majority of the whole class or craft, the Board is of the opinion that the Railway Labor Act does not authorize it to separate

a part or parts of this craft or class and determine separate representatives for such part or parts. The yards at Cleveland and Buffalo are not operated by separate or subsidiary corporations, but all of the yards of the carrier are unified as to operation and as to reporting to the Interstate Commerce Commission. Under such circumstances it is clear that the law requires that a majority of all of the craft or class of employes of this carrier engaged in switching service must choose the representatives.

The request that the two yards be voted separately to choose representatives for the purposes of the Railway Labor Act must therefore be denied.

By order of the National Mediation Board,

GEORGE A. COOK
Secretary

APPENDIX N

In the Matter of REPRESENTATION OF EMPLOYEES OF THE PENNSYLVANIA R. R. CO.—CAPTAINS, DECKHANDS, BRIDGEMEN, ENGINEERS, FIREMEN, AND HOISTING ENGINEERS

Case No. R-305—Decided May 7, 1937

DISMISSAL

Under date of December 7, 1936, the International Longshoremen's Association, Local 933-5, requested the Board to investigate a dispute as to who are the representatives of the above-named employees of the Pennsylvania Railroad Co. in the port of New York, designated and authorized in accordance with the requirements of the Railway Labor Act, and to certify the representatives as provided by Section 2, Ninth, of the Act.

The employees are now working under the following agreements:

Schedule of regulations governing working conditions and seniority of deck personnel in the marine department of the Pennsylvania Railroad Co. in the port of New York, effective November 1, 1935, signed by representatives of the Pennsylvania Railroad Co. and of the National Organization Masters, Mates and Pilots of America.

Schedule of regulations governing working conditions and seniority of engine room personnel in the marine department of the Pennsylvania Railroad Co. in the port of New York, effective November 1, 1935, signed by representatives of the Pennsylvania Railroad Co., of the National Marine Engineers' Beneficial Association, and of the Apprentice Engineers' Association.

Regulations for the government of marine department employees, Philadelphia Harbor, effective July 15, 1921, and rules governing the selection of committeemen to represent marine department employees, Philadelphia Harbor, effective March 19, 1923, amendments effective January 1, 1936, signed by representatives of the Pennsylvania Railroad Co., pilots and extra pilots on ferries and captains on tugboats, of engineers and extra engineers on ferries and engineers on tugboats, of unlicensed marine employees on ferries, tugs, car floats, dredges, floating elevators and barges.

Schedule of rates of pay and regulations for the government of licensed engine room officers on tugboats and steamers operated by the Pennsylvania Railroad Co., in Norfolk Harbor, effective November 1, 1935, signed by representatives of the Pennsylvania Railroad Co. and the National Marine Engineers' Beneficial Association.

Schedule of rates of pay and regulations for the government of licensed deck officers on tugboats and steamers operated by the Pennsylvania Railroad Co. in Norfolk Harbor, effective July 1, 1935, signed by representatives of the Pennsylvania Railroad Co. and of National Organization Masters, Mates and Pilots of America.

Schedule of rates of pay and regulations for the government of unlicensed marine department employees on steamers, tugboats and barges operated by the Pennsylvania Railroad Co. in Norfolk Harbor, effective November 1, 1935, signed by representatives of the Pennsylvania Railroad Co. and of Brotherhood of Ferry Employees—Delmarva Division.

Memorandum of understanding covering method to be followed in the handling of questions between the Pennsylvania Railroad Co. and marine department employees of the Pennsylvania Railroad Co., and establishing the Pennsylvania Railroad Marine Department System Board

of Adjustment, signed on December 20, 1935, by representatives of National Organization Masters, Mates and Pilots of America, National Marine Engineers' Beneficial Association, Apprentice Engineers' Association and Harbor Boatmen's Union.

The National Organization Masters, Mates and Pilots of America, National Marine Engineers' Beneficial Association, Apprentice Engineers' Association and Harbor Boatmen's Union have protested to the Board against any investigation or election being held on the ground that they have been duly designated and authorized to represent deck personnel and engine room personnel on the Pennsylvania Railroad, both licensed and unlicensed.

For the purpose of determining the issues, the Board held a public hearing March 1 to 5, 1937, inclusive, to afford all parties an opportunity to present pertinent facts and arguments with respect to their contentions. Representatives of the International Longshoremen's Association, National Organization Masters, Mates and Pilots of America, National Marine Engineers' Beneficial Association and Apprentice Engineers' Association appeared in person and by counsel and subsequent to the hearings, filed written briefs. The Harbor Boatmen's Union was not represented at the hearing, but did file a written statement of the union's position regarding its right to represent unlicensed marine employees in the Philadelphia Harbor. But, the Brotherhood of Ferry Employees did not appear.

Representation disputes among employees in the marine department of the Pennsylvania Railroad Co. were previously investigated by the National Mediation Board as follows:

Under date of April 3, 1934, the provisions of the Railway Labor Act were invoked by the National Organization Masters, Mates and Pilots of America, to settle a

dispute as to who may properly represent the masters, mates, and pilots of the Pennsylvania Railroad in the port of New York area. After the Act was amended and the National Mediation Board was created, an investigation was held, proved authorizations were checked against the pay-roll records of the carrier and, on the basis of that investigation and check of authorizations, the National Mediation Board certified that the National Organization Masters, Mates and Pilots of America had been duly designated and authorized to represent the masters, mates, and pilots of the Pennsylvania Railroad in the port of New York area, as of October 15, 1934. No organization or individual other than the National Organization Masters, Mates and Pilots of America contended for the right to be designated as representative of the masters, mates, and pilots, and the contention of that organization was limited to the New York Harbor area. Therefore, without objections from any source and without a formal election certification was issued in the above-mentioned form.

Under date of September 22, 1934, the services of the National Mediation Board were invoked by the National Marine Engineers' Beneficial Association to settle a dispute as to who may properly represent the marine engineers of the Pennsylvania Railroad in the port of New York area. An investigation was conducted, proved authorizations were checked against the pay-roll records of the carrier and, on the basis of that investigation and check of authorizations, the National Mediation Board certified that the National Marine Engineers' Beneficial Association had been duly designated and authorized to represent the marine engineers of the Pennsylvania Railroad in the port of New York area, as of October 15, 1934. Again no organization or individual other than the National Marine Engineers' Beneficial Association contended for the right to be designated as the repre-

sentative of the marine engineers, and the contention of that organization being limited to the New York Harbor area, therefore, without objections from any source and without a formal election, certification was issued in the above-mentioned form.

The Pennsylvania Railroad Co. reports a total of 1,137 employees on its boats in New York, Philadelphia, Baltimore, and Norfolk Harbors. Of these, 754 constitute the deck personnel and 383 the engine room personnel.

The International Longshoremen's Association submitted authorizations from a substantial number of marine employees, both deck and engine room, licensed as well as unlicensed, of the Pennsylvania Railroad in the port of New York. No authorizations, however, were submitted from similar employees of the Pennsylvania Railroad in the harbors at Philadelphia, Baltimore, and Norfolk. Those authorizations which were submitted designated Local 933-5, International Longshoremen's Association, as representative—a local of the Longshoremen's Association confined to the harbor of New York. The National Organization Masters, Mates and Pilots of America; the National Marine Engineers' Beneficial Association, the Apprentice Engineers' Association and Harbor Boatmen's Union also submitted a substantial number of authorizations without any identification as to where the employees signing such authorizations were employed.

Agreements now in effect between the Pennsylvania Railroad and representatives of its marine employees differ somewhat from those generally found in marine departments of other carriers as recited herein. However it is the contention of the Pennsylvania Railroad that their agreements with the National Organization Masters, Mates and Pilots and the Marine Engineers' Beneficial Association are system-wide as far as marine operations go.

It is clear that the marine employees in New York Harbor who furnished authorizations to the International Longshoremen's Association to be represented through Local 933-5 do not constitute a craft or class within the meaning of the Railway Labor Act, as there are other employees doing the same kind of work at other harbors served by the Pennsylvania Railroad.

Section 2, First, of the Railway Labor Act, amended, provides "that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. * * *."

Section 2, Fourth, of the Railway Labor Act, amended, provides that employees shall have the right to organize and bargain collectively through representatives of their own choosing and that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act * * *."

In the event of a dispute among a carrier's employees where two or more organizations are contesting for the right to represent them the Railway Labor Act does not authorize the National Mediation Board to certify representatives for limited numbers or groups of employees confined to a specific area, when such a limited number or group is part of a whole class or craft on a carrier.

Upon the whole record, and specifically upon the facts stated above, the National Mediation Board finds that the marine employees of the Pennsylvania Railroad confined to the port of New York do not constitute a separate craft or class or separate crafts or classes but are a part of the crafts or classes of marine employees as a whole employed by the carrier.

The requests of the International Longshoremen's Association that the marine employees of the Pennsylvania

Railroad in New York Harbor be voted separately to choose representatives for the purposes of the Railway Labor Act must, therefore, be denied and the application of the International Longshoremen's Association, Case R-305, is therefore dismissed.

APPENDIX O

Merger Protection Agreement, Sections 8 and 9*

Section 8

The New Company will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto.

Section 9

For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement shall be inapplicable and the following provision inserted in lieu thereof:

In the event any dispute or controversy arises between the said carriers or the New Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between said carriers or the New Company and individual labor organizations which are parties hereto pertaining to the said transactions, or a dispute over the failure to make, or the terms to be included within, an implementing agreement, which cannot be settled by said carriers or the New Company and the labor organization or organiza-

* J.A. 51-53.

tions involved within thirty (30) days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman, in which event the compensation and expenses of the Chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall then be paid in accordance with existing law. If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The Committee shall meet within fifteen (15) days after selection or appointment of the neutral member and shall render its decision within sixty (60) days thereafter. The decision of the majority of the arbitration committee shall be final and binding, except that in any case in which there is an unequal number of carrier and organization members on the arbitration committee, the decision of the neutral member shall be final and binding. The time limits above prescribed may be extended by mutual agreement.

SUPREME COURT

FILE

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MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No 74-896

BURLINGTON NORTHERN, INC.,

Petitioner,

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, AN AGENCY OF THE UNITED STATES OF AMERICA; AND GEORGE S. IVES, DAVID H. STOWE, AND PETER C. BENEDICT, MEMBERS OF THE NATIONAL MEDIATION BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT AMERICAN RAILWAY SUPERVISORS ASSOCIATION IN OPPOSITION.

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March 15, 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-896.

BURLINGTON NORTHERN, INC.,

Petitioner,

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, AN AGENCY OF THE UNITED STATES OF AMERICA; AND GEORGE S. IVES, DAVID H. STOWE, AND PETER C. BENEDICT, MEMBERS OF THE NATIONAL MEDIATION BOARD,

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BRIEF OF RESPONDENT AMERICAN RAILWAY SUPERVISORS ASSOCIATION IN OPPOSITION.

QUESTION PRESENTED.

The "Questions Presented" by petitioner (Pet. 2) are not the real issues in this case. As will appear from this Brief the issue is:

Whether the Court of Appeals correctly ruled that no representation issue under the Railway Labor Act was presented by petitioner and that a Merger Protection Agreement, entered

into by the parties as a condition imposed for employee protection by the Interstate Commerce Commission, pursuant to Interstate Commerce Act §§ 5(2)(f) and 5(11), was consistent with the Railway Labor Act and was a valid and binding agreement, requiring the petitioner to submit an issue of interpretation of the agreement to the arbitration panel provided for in the agreement.

STATUTES INVOLVED.

The statutory provisions principally involved are § 5(2)(f) and § 5(11) of the Interstate Commerce Act, 49 U. S. C. §§ 5(2)(f) and 5(11), and §§ 2, Fourth and Ninth of the Railway Labor Act, 45 U. S. C. § 152, Fourth and Ninth, set forth in Appendix A to the Petition, 9a 10a, 1a, 2a.

STATEMENT.

Pursuant to Supreme Court Rules 40(1)(e) and 40(2), respondent ("ARSA") will rely on the facts concisely and accurately summarized in the opinion of the Court of Appeals and will limit this statement to some of petitioner's misstatements of fact and to misleading matters in its mixed recitation of fact and argument under the heading "Statement of Facts."

The key finding of fact and law by the Court of Appeals—that there is not present here any representation dispute within § 2, Ninth of the Railway Labor Act ("RLA"), 503 F. 2d at 60-1, 63, since no employee, or group of employees or union has challenged the representation by respondent—is not challenged by petitioner. As set forth in the Argument, *infra*, this unchallenged finding undercuts virtually all of petitioner's arguments as to the merits and also makes plain there is no issue warranting review by this Court.

It is also undisputed that beginning several months after the merger petitioner not only refused to recognize ARSA and repudiated the Merger Protection Agreement ("MPA"), but also unilaterally abrogated pre- and post-merger collective agreements with ARSA concerning rates of pay, rules and working conditions and unilaterally altered the same to the disadvantage of employees covered by those agreements (J. A. 32, 61; R., Portsche Dep. pp. 60-1, 73-80, 86-7 and Ex. 8). Petitioner took this action after making new collective agreements with ARSA subsequent to the merger, including a union security agreement providing for a check-off of dues with ARSA covering mechanical supervisors on the former CB&Q segment (Under § 2, Eleventh of the RLA [45 U. S. C. § 152, Eleventh] such an agreement can be made by a railroad only with a labor organization that is duly authorized to represent the employees involved).

For a period of six months after the merger it also settled grievances of employees with ARSA. (R., Portsche Dep. pp. 63-67, Exs. 3-7; Aff. of Tracy, Exec. Sec. N. M. B., Ex. J).[1]

We turn next to other inaccurate or misleading statements by petitioner.

1. Petitioner makes the incredible assertion that the MPA "was silent as to bargaining units and as to the representation of employees after the merger." (Pet. 5.) Based on this assertion, petitioner argues that the Court below erred in concluding that the merger agreement recognized the labor organizations signatory thereto, including ARSA (Pet. 12, 23, n. 32). Thus, we are compelled to set forth here the relevant portions of the MPA (the entire agreement is at J. A. 43-56). The preamble recites:

> "* * * the international and national labor organizations signatory hereto are the authorized and recognized representative of certain groups of non-operating employees of said carriers * * *" (J. A. 45).

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1. In an apparent effort to minimize the effect of its handling grievances after the merger, petitioner states (Pet. 8, n. 13) "Burlington Northern has continued to handle grievances with anyone (including ARSA) desired by the employee whose grievance is involved, in accordance with the Railway Labor Act rule that grievance representation is an individual matter, not a unit matter." This statement is false. Subsequent to the merger, 40 claims were filed with the National Railroad Adjustment Board ("NRAB") by ARSA against petitioner concerning the latter's deviations from the collective agreements. Petitioner's response was that the NRAB had no jurisdiction to entertain these claims since ARSA was no longer the representative of the grievants and that the collective agreements relating to rates of pay, rules, and working conditions were no longer in force or effect. After the NRAB sustained all claims, petitioner filed another action in the same District Court to set aside the awards (N. D. Ill., No. 72-1775). In support of its position petitioner made the same arguments it has in this case. After the decision of the Court of Appeals in this case the District Court in No. 72-1775 entered summary judgment on January 31, 1975, dismissing the complaint and granting ARSA's counterclaim for enforcement of the NRAB's orders and awards.

Section 5 provides:

> "The right of the New Company [Petitioner] to transfer work throughout the merged system is recognized. In consideration of the foregoing employee benefits, the labor organizations signatory hereto, upon notice subject to the provisions of Section 4 of the Washington Job Protection Agreement and subject also to the provisions of Section 9 of this Agreement and those of the Memorandum of Understanding attached hereto as Appendix E, will negotiate and enter into implementing agreements providing for the transfer and use of employees and allocations and rearrangements of forces made necessary by such changes to the extent not otherwise permissible under existing rules and agreements. The labor organizations and carriers signatory hereto will cooperate to this end. The implementing agreements to be negotiated with respect to the transfer and use of employees and allocation or rearrangement of forces shall enable the New Company to take such action without liability to furloughed employees who may be affected thereby." (J. A. 50-51; Pet. 93a).

Section 8 provides that petitioner:

> "* * * will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto." (J. A. 51-52; Pet. 93a).

Section 9 provides for final and binding arbitration of any dispute between petitioner and ARSA "with respect to the interpretation or application of any provisions of this agreement . . ." (J. A. 52). It provides further that if the parties are unable to select a neutral chairman, the parties may request the National Mediation Board ("NMB") to appoint the neutral.

Other provisions to insure against a deadlock are provided. (The full text of §§ 8 and 9 are set forth also at Pet. 93a-94a).

Section 11 provides:

> "The foregoing represents an agreed settlement of protection of the interests of the employees of the said carriers in the said transactions. Said agreed settlement of protective benefits is made on behalf of said employees by their authorized and recognized bargaining representatives signatory hereto pursuant to Section 5(2)(f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, and shall become applicable only in the event of approval by the Commission of the proposed transactions and consummation thereof. It shall be considered and construed as a separate agreement between the said carriers, the New Company, and each of the labor organizations signatory hereto." (J. A. 53-54).

Section 12 provides:

> "It is understood and agreed that the provisions of this Agreement shall be for the benefit only of the employees now or hereafter represented by the labor organization parties hereto." (J. A. 54).

Additional duties and responsibilities to be carried out by the labor organizations signatory to the agreement post merger are set forth in Appendices A, D, E, and Letter of Intent No. 3 (R., Ex. 1 to Answer and Counterclaim of ARSA, pp. 14-29). The Letter of Intent makes reference to § 8 of the agreement and recognizes the authority of the labor organizations signatory to the agreement to negotiate with petitioner after the merger. The foregoing provisions of the MPA were succinctly summarized by the Court of Appeals at 503 F. 2d 63; Pet. 18a-19a.

2. Petitioner seeks to give the impression that the sole purpose of the MPA was to provide "attrition protection." (Pet. 4). In order to avoid the implications of the plenary authority vested in the Interstate Commerce Commission ("ICC") by § 5(11) of the Interstate Commerce Act, petitioner argued to

the Court of Appeals that "it is not true that entry into the merger protection agreement was a condition precedent to the merger." (Reply Brief for Burlington Northern, p. 5). It now makes a narrower claim that "the factual premise that the ICC required recognition of ARSA as a condition of approval of the merger is unsupportable" (Pet. 24) apparently conceding, as it must in the face of the history of the ICC proceedings, that approval of the MPA was a condition of approval of the merger.

This narrower claim rests on the device of relegating to the Appendix the order of the ICC requiring petitioner to provide employees "with the basic protection as particularly described in the contract entered into between the applicants and the Brotherhood of Locomotive Engineers and Brotherhood of Railway Trainmen" (Pet. 49a). The agreement with the Brotherhood of Railway Trainmen ("B. R. T.") contains provisions substantially identical with the MPA here, including one that petitioner "will take over and assume all contracts" between its constituent railroads and the union. Relevant parts of the B. R. T. agreement are set forth in the Appendix to this brief.

Both agreements recognized the labor organizations signatory to them as the collective bargaining representatives of the employees on the constituent railroads, not only for the purpose of making the agreement, but for the purpose of enforcing the rights of the employees after the merger and otherwise implementing the agreement. Job protection whether it be "attrition protection" or any other protection would be meaningless without such representation. Recognition of the signatory labor organizations for the foregoing purposes, made explicit in the B. R. T. agreement, was one of the conditions ordered by the ICC when it required petitioner to provide the basic protection provided in the B. R. T. agreement.

3. Petitioner devotes three pages (Pet. 6-9) to the fact that prior to the merger some technicians on the Great Northern sought to invoke the jurisdiction of the NMB under § 2,

Ninth, of the RLA, and that petition was dismissed as moot on June 3, 1970. It places great emphasis on this dismissal as a basis for its repudiation of the MPA and its unilateral determination to alter the collective agreements concerning the rates of pay, rules and working conditions of the employees represented by ARSA. Accordingly, it is of special interest to note the shift in its position concerning this dismissal. In its first brief in the Court of Appeals it asserted (p. 7) that it "understood the NMB action to mean that the merger had terminated the separate existence of the Great Northern technicians' bargaining unit."

When ARSA responded by referring to the letter-clarification by the NMB issued on July 14, 1970, that the notice did not "nullify or disturb any representation rights arising out of the certification issued in Case R-3439 [ARSA's certificate]," petitioner in its reply brief asserted that the letter of the NMB "simply declined to state one way or the other the effect of the dismissal on representation" (Pl. Reply Br., p. 9). It now characterizes the letter as an "obscure response" (Pet. 6). It neglects to make reference to the affidavit filed by Mr. Tracy, Executive Secretary of the NMB, as to the position of the NMB, in the context of its discussion of the NMB position, but relegates reference to this affidavit to a footnote in its argument (Pet. 19, n. 29). The Tracy affidavit was filed in response to the affidavit of the petitioner's Vice President for Labor Relations (May 24, 1972) that the NMB had "ruled" that ARSA representation rights were terminated by the merger. Tracy's affidavit stated, as the Court of Appeals observed (Pet. 16a), that "no such determination was made expressly or impliedly in the National Mediation Board's dismissal notice of June 3, 1970." The Court below found that the NMB "twice repudiated [petitioner's] contention." 503 F. 2d at 63, Pet. 19a.

ARGUMENT.

THE DECISION BELOW IS CORRECT. THERE IS NO CONFLICT OF DECISIONS OR ISSUE WARRANTING REVIEW BY THIS COURT.

Petitioner has taken a bizarre position, based on a bootstrap argument with no basis in fact or law, and completely at variance with long-established railroad industry practices implementing substantially similar employee merger protection agreements.

A. Petitioner presents itself as the champion of its employees and all other railroad employees (Pet. 14, 15). Its plea has a hollow ring. For more than four years the petitioner has shunted aside the collective agreements entered into for the benefit of the employees represented by ARSA, and instead unilaterally determined their rates of pay, rules, and working conditions. For more than four years the petitioner has refused to consider the grievances of its employees represented by ARSA and has litigated awards in their favor entered by the NRAB. For more than four years the employees represented by ARSA have been denied the assistance of ARSA in securing their job protection rights under collective agreements and the MPA.

The delusional quality of petitioner's position, that a railroad union loses its certification under the RLA when a merger is consummated under the facts and circumstances of this case, becomes apparent when its consequences are considered.

(1) It would render impossible the duty of the ICC to "protect the interests of the railroad employees affected" as required by § 5(2)(f) of the Interstate Commerce Act. In many mergers, different railroad labor organizations represent the

same craft or class on the merging railroads. In some mergers, a labor organization will represent a craft or class on one of the merging railroads, and no organization will represent that craft or class on another of the merging railroads. Effective protection for the employees requires that the collective agreements in effect at the time of the merger continue after the merger until changed in accordance with the RLA. These agreements and any job protection provided by the ICC would be meaningless without a union to police them.

(2) Railroad labor organizations could not reasonably be expected to agree to their demise by entering into a merger agreement (See 503 F. 2d at 63; Pet. 19a).

(3) Petitioner's position is completely at odds with industry practice. There have been numerous railroad mergers in the past 10-15 years in which merger protection agreements have been made with similar or identical provisions as the MPA here (Pet. 15). Uniformly throughout the industry, and no exception has been cited by petitioner, the interpretation placed upon such merger protection agreements is that the new or successor railroad after the merger will continue to comply with provisions of the collective agreements made prior to the merger with each of the merging railroads until such agreements are changed in accordance with the procedures of the RLA (J. A. 68-9, 81-90; R., Hickey Dep., pp. 23, 28-34, 56-79). The record also establishes that where a union represented a craft or class on one or more of the merging railroads, the representation or non-representation of that craft or class continued in the new, merged railroad in the same manner as it did prior to the merger on its constituent railroads (*ibid*).

In at least eight major railroad mergers since 1959, under merger protection agreements similar or identical to § 8 of the MPA here, and under facts similar to this case—*i.e.*, where a union represented a craft or class on one or more merging railroads but the craft or class had no union representation on

one or more of the merging railroads, the representation or non-representation of that craft or class continued in the new, merged railroad in the same segmented manner as it did prior to the merger on its constituent railroads (*ibid*). This uniform industry construction and application of merger agreements is the only construction consistent with the language of the agreement and is the only construction which would be acceptable to the labor organizations in the industry. Petitioner's position, if accepted, would create chaos.[2]

B. Contrary to petitioner's assertion (p. 14) the Court below did not hold that under the RLA a "carrier must recognize and bargain with a representational unit that is not carrier-wide . . ." The Court held (503 F. 2d, 63; Pet. 19a):

> "The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act does not automatically render applicable the NMB's policy determination under the act that a class or craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect. Compare *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 792, rev'd on other grounds, 320 U. S. 297 (1943). If the contrary were true, the Merger Protection Agreement, which became effective only when the merger became effective, would have become a nullity upon its effective date, and the representation rights of ARSA would

2. At the time the MPA here was negotiated, petitioner was fully aware of the uniform industry practice (J. A. 82-3). Also, as the Court of Appeals found (503 F. 2d at 63) contemporaneously in this case, petitioner has placed this very construction on the MPA by continuing to recognize ARSA as the collective bargaining representative of certain crafts of its employees on certain segments of its railroad property and by making new collective agreements and entering into grievance settlements with ARSA for a number of months after the merger became effective on March 2, 1970 (R., Portsche Dep. pp. 63-87).

be terminated by the very agreement that purports to continue them in force."

Petitioner ignores the facts. The agreements in issue were made at a time when, *before* the merger, ARSA did represent the employees on a carrier-wide basis-viz., the supervisors on the CB&Q railroad and the technicians on the Great Northern. Petitioner's whole argument is structured on the false premise that it was forced into these agreements after the merger. All the Court of Appeals held was that these agreements were valid when voluntarily made under the RLA and Interstate Commerce Act and that in the *absence* of a *bona-fide* representation dispute under § 2, Ninth of the RLA, ARSA could continue to represent after the merger the same employees it represented before the merger.[3] Since there is no representation dispute here under § 2, Ninth of the RLA, this case does not present the issue as to whether a union may be certified by the NMB on less than a system-wide craft or class basis. See also ¶ C, *infra*, pp. 16-7.

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3. Petitioner also ignores the essence of the RLA and NMB interpretations that even where there is a change in representative status, the agreements in effect continue until changed in accordance with the RLA. The NMB has always stated that:

"In disputes where there is a collective bargaining agreement in existence and the Board's certification results in a change in the employees' representative, questions frequently arise concerning the effect of the change on the existing agreement. The Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act. Conferences must then be held to agree on the changes exactly as if the original representatives had been continued. The purpose of such a policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an

Petitioner's desperate effort to make this case appear important by referring to merger cases under the LMRA (Pet. 16) is wholly without merit. First, there is a fundamental difference between the LMRA and the RLA in that as noted above (n. 3) agreements made under the RLA have an on-going character. Second, here there is the critical presence of a merger protection agreement, made a condition to the merger by the ICC, which in unmistakably plain language says that petitioner agreed, after the merger, to "take over and assume all contracts . . . and agreements" between ARSA and petitioner's constituent railroads that were in effect at the time of the merger. Whatever problems there may have been for successor employers in mergers or acquisitions under the LMRA in the cases cited by petitioner (Pet. 16) no such problems have ever arisen under the RLA. The only carrier that has ever required "guidance" (Pet. 15) during the spate of railroad mergers and protection agreements over the past 15 years is the petitioner.

Athough petitioner does not assert there is a representation dispute here within § 2, Ninth of the RLA, it contrives artificially to create a representation issue. The fulcrum of petitioner's case is that upon consummation of the merger ARSA lost its representation rights, *i.e.*, was decertified, because as of that time, only a union representing a craft or class for the entire system of the new railroad could be recognized by the railroad. First, it is undisputed that when the MPA was negotiated, ARSA represented the craft or class of mechanical supervisors employed by the CB&Q, and the craft or class of technicians employed by Great Northern (J. A. 5). At that time, and since, ARSA's representation rights have not been challenged by any employee, group of employees or union. Under such circum-

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agreement. The procedures of section 6 of the Railway Labor Act are to be followed if any changes in agreements are desired." 37th Annual Report of the NMB (1971), p. 34; and prior Annual Reports. See also *B. R. T.* v. *Akron & B. B. R. Co.*, 385 F. 2d 581, 593 (C. A. D. C. 1968), *cert. denied*, 390 U. S. 923; and *Manning* v. *American Air Lines*, 329 F. 2d 32, 34 (C. A. 2, 1964), *cert. denied*, 379 U. S. 817.

stances, as the Court of Appeals held (503 F. 2d, 60-1, 62, 63) there is no issue of representation.[4] Thus, when the agreements were made there was no impediment under the RLA to voluntary recognition by petitioner of ARSA as the collective bargaining representative after the merger for the craft it represented.

Second, petitioner also ignores an important labor law principle: a union may become the collective bargaining agent for a craft or class of employees by *recognition* of the employer as well as by election and certification by the NMB. Prior to the 1934 amendments to the RLA there was no governmental mechanism for resolving disputes concerning representation among employees and securing recognition through certification. Thereafter, unless a representation dispute developed among employees which could be resolved under § 2, Ninth, railroads which had previously recognized unions were precluded from refusing recognition. Many unions are presently functioning as collective bargaining representatives without certification. *Akron, C. & Y. R. Co.*, v. *I. B. E. W.*, 237 F. Supp. 343, 350, 354 (N. D. Ill., 1964). Thus, under the RLA a railroad may recognize a union as representative of a craft or class of employees on less than a system-wide basis *(i.e.*, on one or more but less than all segments of a merged railroad), in the absence of any representation dispute, and having accorded recognition may not

4. Also, as stated by the District Court: "Under Section 2 Ninth of the RLA, a representation dispute exists only where an issue has been raised 'among a carrier's employees as to who are the representatives of such employees.' Thus, a representation dispute may be raised only by the employees of a carrier or by a union claiming to represent such employees, *Brotherhood of Locomotive Firemen & Enginemen* v. *N. M. B.*, ... U. S. App. D. C. ....., 410 F. 2d 1025, *cert. denied*, 396 U. S. 878 (1969). The NMB has held consistently that a carrier is not even a party to section 2 Ninth disputes, *Thirty-Seventh Annual Report of the National Mediation Board* at 33 (1971), and its view in this respect is shared by the Supreme Court, *Brotherhood of Railway and Steamship Clerks* v. *Ass'n for Benefit of Non-Contract Employees*, 380 U. S. 650, 666-67 (1965). It should be noted that the RLA differs from the LMRA in this respect also." (Pet. 32a, n. 8; 350 F. Supp. at 901, n. 8).

withdraw it.[5] It is common today on railroads, merged during the past 15 years, to have a union represent a craft or class of employees on one or more but less than all segments of such merged railroads. Prior to petitioner's assertion in this case, there has never been a suggestion by any railroad, by any court or by the NMB that such voluntary recognition and single segment representation is impermissible under the RLA. Here, as the Court below held, 503 F. 2d at 63, the petitioner has recognized ARSA voluntarily twice: (1) by entering into the MPA it recognized ARSA's role after the merger (Preamble, §§ 5, 8, 9, 11 and 12); and (2) by negotiating and making agreements with ARSA after the merger.

Third, the alleged representation issue (*i.e.* decertification) was conjured up after the merger by the petitioner to rationalize and carry out a crude and outright breach of its clear and unequivocal obligation to comply with the MPA, including specifically the obligation to arbitrate, and to continue to recognize ARSA as a party to the contract and to carry out existing collective agreements with it.

Fourth, petitioner knew prior to entering into the MPA that after the merger ARSA would continue to represent on a segmented basis those employees it represented before the merger on petitioner's constituent carriers. (n. 2, *supra.*) Notwithstanding, it proceeded to solemnly enter into the agreement, a condition precedent to securing ICC approval of the merger. Having obtained approval of the merger, petitioner reneged on its promises and now seeks judicial approval of its conduct.[6]

5. But this is not to say, as petitioner does (Pet. 14-15), that the MPA locks the employees into their pre-merger representation. On the contrary, whenever a dispute arises among the carrier's employees as to who are their representatives, the representation may be changed in accordance with § 2, Ninth of the RLA, 45 U. S. C. A., § 152, Ninth. Here, as the Court of Appeals held, there is no such dispute. Petitioner's argument regarding the 1973 Election (Pet. 14-15), a matter not part of the record, falls also for the other reasons stated by the Court of Appeals, 503 F. 2d at 63-4, Pet. 20a.

6. Petitioner thus seeks judicial approval for its violation of the "heart of the RLA", to assert every reasonable effort to make and

The pretext for petitioner's breach of the MPA is the NMB's dismissal of the Great Northern technicians' petition on June 3, 1970. The Court of Appeals summarized the record when it stated (503 F. 2d at 63):

> "The NMB has twice repudiated plaintiff's contention that its action in dismissing the Great Northern technicians' petition on June 3, 1970 implied that the merger terminated ARSA's status as the certified representative of the technician's. The indications NMB has given as to its position in this matter are to the effect that it still recognizes ARSA as the bargaining representative under the collective bargaining agreements entered into between ARSA and plaintiff's predecessors."

Fifth, petitioner's position has the following absurd results: (1) an agreement expressly entered into for the *"protection"* of employees would afford such employees no protection at all but leave them without any of their hard-fought collective agreements and subject them only to the unilateral whims of the carrier; and (2) the labor organizations signatory to the "protection" agreement would be deemed to have voluntarily agreed to give up their right and duty to represent the employees they represented on the component railroads.

C. The argument advanced by petitioner (Pet. 16-22) that the decision below conflicts with the RLA and its legislative history, the NMB and the *Switchmen's* case are all misplaced and irrelevant. They are concerned with genuine representation disputes under § 2, Ninth where in fact a union or group of employees is challenging another union. There is no such dispute here. Thus, the Court below did not and could not hold that in a representation dispute the carrier may be forced to bargain with or recognize a union on less than a system-wide craft basis. Petitioner ignores completely the principle that in the absence of a § 2, Ninth representation dispute a railroad may voluntarily recognize a union even on less than a system-

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maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes. *Chicago & N. W. R. Co.* v. *U. T. U.*, 402 U. S. 570 (1971).

wide basis. The *Switchmen's* case[7], heavily relied on by petitioner (Pet. 19-22), does not conflict with the decision below. It involved a representation dispute under § 2, Ninth of the RLA. Here there is no such dispute and there can be no conflict.

D. We have demonstrated that the MPA, by which the petitioner gave a continuing role to ARSA after the merger, was in complete conformity with the RLA. But assuming *arguendo* there is a conflict between the RLA and the Interstate Commerce Act, the Court of Appeals was completely correct in holding that the ICC's exercise of the plenary authority given to it by § 5(11) of the Interstate Commerce Act could relieve the railroad and the union of their obligations under the RLA. See *Brotherhood of L. E.* v. *Chicago & N. W. Ry.*, 314 F. 2d 424, 431-432 (8th Cir.), *cert. denied*, 375 U. S. 819 (1963), cited below, 503 F. 2d at 63.

Petitioner seeks to distinguish *B. L. E.* on the basis that what was involved there was an issue involving the inability of the railroad and the organization to agree on how employees should be assigned when they were displaced and how work forces should be rearranged. Petitioner overlooks that the basis of the union's claim was that the dispute was "major" under the RLA since it proposed a change in seniority rights and that, accordingly, the railroad was required to serve a notice pursuant to § 6 of the RLA to begin the negotiation process under the Act. This requirement of the RLA is the heart of that statute. Notwithstanding, the Court ruled that under the provision of § 5(11) of the Interstate Commerce Act the ICC could and did relieve the railroad of this obligation under the RLA.

E. The Court below did not usurp the arbitrator's jurisdiction to interpret the agreement. Petitioner argues that the Court of Appeals interpreted § 8 of the MPA, a matter committed to the arbitration panel under § 9 of that agreement, and argues further that § 8 does not involve representation or recognition

7. *Switchmen's Union* v. *N. M. B.*, 135 F. 2d 785 (D. C. Cir. 1943), rev'd for lack of jurisdiction, 320 U. S. 297 (1943).

(Pet. 12, 31, 25-26). To begin with the judgment of the Court of Appeals is limited to a mandate directing the District Court to order arbitration of the issue of interpretation. The court did not decide the issue of interpretation referred to the arbitration panel. It was required to consider the legality of the MPA in order to decide whether to order arbitration—first, because the issue which ARSA sought to have arbitrated involved §§ 8 and 9 of that agreement, and second, because of petitioner's claim that if the agreement recognized ARSA as the collective bargaining agent of the employees on the CB&Q and Great Northern segments of the Burlington Northern after the merger it was invalid.

The Court of Appeals did no more than pass on the contract's legal validity and left the final contractual interpretation to arbitration. Under the RLA the courts frequently give what appears to be "contract interpretation" to agreements in deciding whether the contract should be interpreted by arbitration. See, *e.g.*, *Brotherhood of L. E.* v. *M-K-T R. Co.*, 363 U. S. 528, 533-4 (1960); *U. T. U.* v. *Penn Central T. Co.*, 505 F. 2d 542 (C. A. 3, 1974); *Rutland Ry. Corp.* v. *Brotherhood of L. E.*, 307 F. 2d 21, 35-6 (C. A. 2, 1962).

The petitioner's claim, in particular, required the Court to consider all of the provisions of the MPA and its background. This it did as a necessary prelude to reaching its decision that the agreement was lawful and the issue submitted by ARSA should be arbitrated. In order to create the impression that the Court of Appeals interpreted § 8 of the MPA to require recognition of ARSA by petitioner, petitioner distorts the opinion below. Thus, the petitioner states: "The Court rejected that argument [that representation must be system-wide], holding that as it interpreted and applied Section 8 of the merger protection agreement, Burlington Northern had agreed therein to recognize 'the labor organizations signatory to the agreement including ARSA,' and that Section 8 was a 'voluntary agreement by plaintiff to recognize a collective bargaining repre-

sentative of a class or craft that is not system-wide.' (App. B, pp. 18a, 19a, *infra.*)" (Pet. 12).

The language quoted from the opinion appears in a sentence, the full text of which reads (503 F. 2d at 63):

> "Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect."

In the paragraph which precedes the sentence above quoted, the Court of Appeals stated (*id.*):

> "In the agreement plaintiff recognized the labor organizations signatory to the agreement including ARSA, committed themselves to maintain and abide by all collective bargaining agreements until such agreements are changed pursuant to the procedures of the Railway Labor Act, agreed to a system for resolving disputes concerning the interpretation and application of the agreement, and agreed to a continued role for ARSA in the implementation of the merger agreement and in the interpretation, application and enforcement of existing collective bargaining agreements."

This statement by the Court constituted a summary of the provisions of the MPA. Petitioner's argument that the Court asserted "jurisdiction to interpret and apply the agreement in this regard and to declare that the railroad was in 'breach' thereof" (Pet. 26) further distorts the opinion. The word "breach" quoted by petitioner is used only once in the opinion. In the context in which it is used it clearly refers to petitioner's refusal to arbitrate the dispute, in violation of § 9 of the MPA which the court held required arbitration.

There is no factual basis for petitioner's repeated assertions (Pet. 12, 13, 23, n. 32 and 26) that the Court of Appeals interpreted and applied § 8 of the MPA so as to require Burlington Northern to recognize and bargain with ARSA. The Court held simply that the issue submitted by ARSA for arbitration

must be decided by arbitration as specified by the MPA. The decision is limited to this holding. Accordingly, petitioner's citations to cases which hold that the interpretation role is for the arbitrator are irrelevant (Pet. 26). It also follows that, contrary to petitioner's claim (Pet. 27), the opinion below is completely consistent with *Bozeman*, one of the decisions cited by the Court below in holding that the obligation to arbitrate will be enforced by the courts.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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March 15, 1975.

APPENDIX.

AGREEMENT.

For Protection of Employees Who May Be Represented by the Brotherhood of Railroad Trainmen in Event of Approval of Merger and Related Applications Filed by Great Northern Pacific & Burlington Lines, Inc. and Other Carriers in I. C. C. Finance Dockets Nos. 21478, 21479 and 21480.

* * * * *

Section 2.

* * * * *

(b) The New Company will take over and assume all contracts, schedules and agreements between Great Northern, Northern Pacific, Chicago, Burlington & Quincy and Spokane, Portland and Seattle, respectively, and the Brotherhood of Railroad Trainmen concerning rates of pay, rules, working conditions and fringe benefits in effect on the final effective date of the Commission Order covering the Great Northern Pacific & Burlington Lines merger and will be bound by the terms and provisions thereof in the same manner and to the same extent as if the New Company had been a party thereto, subject to changes made in accordance with the provisions of the Railway Labor Act, and subject to Section 7 of this Agreement.

Section 10.

For the purposes of the Great Northern Pacific & Burlington Lines merger, Section 13 of the Washington Job Protection Agreement (Appendix A) is inapplicable and the following provisions shall apply in lieu thereof:

In the event any dispute or controversy arises between the Carriers and/or the New Company and the representatives of Brotherhood of Railroad Trainmen with respect to the provisions

of an implementing agreement upon which the parties have failed to reach agreement in accordance with Section 8 of this Agreement, the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 6 of this Agreement) or of any implementing agreement entered into between the New Company and the representatives of the Brotherhood of Railroad Trainmen pertaining to the said merger or related transaction, which cannot be settled by the Carriers and/or the New Company and the representative of the Brotherhood of Railroad Trainmen within thirty days after the dispute arises, such dispute may be referred by either party to a Disputes Committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to a Disputes Committee, each party shall, within ten (10) days, select a member of the Disputes Committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten (10) days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall be paid in accordance with existing law. If any party fails to select its member of the Disputes Committee within the prescribed time limit, such party's Chief Executive Officer or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The Committee shall meet within fifteen (15) days of the selection or appointment of the neutral member and shall render its decision within sixty (60) days thereafter. The decision of the majority of the Disputes Committee shall be final and binding.

Section 11.

This Agreement shall not be construed or used to prohibit or in any way limit the rights or obligations of the parties to modify

or make changes in agreements affecting rates of pay, rules or working conditions to which the Carriers are parties and which may be effectuated through concerted or national handling in the railroad industry.

Section 12.

This Agreement is intended to provide a fair and equitable arrangement for the protection of the interests of the Carriers' employees represented by the Brotherhood of Railroad Trainmen as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended.

Signed at Chicago, Illinois, this 14 day of December, 1965.

FOR THE BROTHERHOOD OF
RAILROAD TRAINMEN:

V. R. ROBERTS,
General Chairman,
Chicago, Burlington & Quincy Railroad
Company.

P. S. GRIFFITH,
General Chairman,
Northern Pacific Railway Company.

JAMES E. HURLEY,
General Chairman,
Spokane, Portland and Seattle Railway
Company.

J. A. MICHELS,
General Chairman,
Great Northern Railway Company.

APPROVED:

F. D. TUFFLEY,
Alt. Vice President.

FOR THE GREAT NORTHERN PACIFIC &
BURLINGTON LINES, INC.:

T. C. De BUTTS,
A. E. EGBERS,
G. M. HARE,
H. J. TIERNEY.

FOR CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY:

A. E. EGBERS,
Assistant to the President.

FOR THE NORTHERN PACIFIC RAILWAY COMPANY:

G. M. HARE,
Chief of Labor Relations.

FOR THE SPOKANE PORTLAND AND SEATTLE RAILWAY COMPANY:

H. J. TIERNEY,
Chief of Personnel.

FOR THE GREAT NORTHERN RAILWAY COMPANY:

T. C. De BUTTS,
Vice President (Labor Relations).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-896

BURLINGTON NORTHERN INC.,
Petitioner,

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, an Agency of the United States of America; and GEORGE S. IVES, DAVID H. STOWE, and PETER C. BENEDICT, Members of the National Mediation Board,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

Section 2 Fourth of the Railway Labor Act (45 U.S.C. § 152 Fourth) provides for "craft or class" representational units, unlike the Labor Management Relations Act under which any "appropriate" unit may be a representational unit (29 U.S.C. § 159). In the *Switchmen's*

Union case,[1] the Court of Appeals held that the prescribed "craft or class" representational units on a consolidated railroad *must* be carrier-wide in scope, whereas in this case the Court of Appeals held that they need not be. The decision in the *Switchmen's Union* case was supported by the legislative history of the "craft or class" provisions of the Act, which explicitly demonstrates that the draftsmen intended carrier-wide representational units, and by the decisions of the National Mediation Board, which has consistently required such units over a period of 40 years. (See Pet. 16-22)

Respondent ARSA deals with the conflict between the decision below and the decision in the *Switchmen's Union* case, the legislative history, and the consistent administrative decisions in a single cursory paragraph in its brief in opposition—Paragraph C on pages 16-17. In that paragraph, ARSA dismisses the rule for which these authorities stand—that the "craft or class" representational units prescribed by Section 2 Fourth must be carrier-wide in scope even on a merged railroad—on the ground that in this case no employee is presently challenging ARSA's representation claims under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth). That is a curious claim in light of the fact that the NMB will not entertain petitions under Section 2 Ninth that do not seek carrier-wide certification, as the former Great Northern technicians discovered when they sought to dislodge ARSA. (See Pet. 6, 19 n. 29, 52a-53a.) It is even more curious in light of the fact that the NMB has now ruled against ARSA under Section 2 Ninth with respect to representation of mechanical supervisors, at least as we understand its ruling. (See Pet. 11, 50a-51a.) More fundamentally, however, ARSA fails to explain what the

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[1] *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785 (D.C. Cir. 1943), *rev'd for lack of jurisdiction*, 320 U.S. 297 (1943).

pendency of a petition under *Section 2 Ninth* has to do with the scope of the "craft or class" representational units prescribed by *Section 2 Fourth*. The "distinction" advanced by ARSA has no relevance to the question presented.

The remainder of pages 1-17 of ARSA's brief in opposition is devoted to arguments addressed to the merits of the statutory issues, arguments that concern the interpretation of the merger protection agreement, and uncomplimentary characterizations of our petition for certiorari. However, a detailed response on the merits is properly a matter for a brief on the merits; the interpretation of the agreement is properly a matter for the arbitrator; and the characterizations of our petition —the claims that we are responsible for "misstatements" (p. 3), "false" statements (p. 4) and "incredible assertions" (p. 4), and that our position is "bizarre" and "delusional" (p. 9)—reflect an approach to advocacy for which we lack enthusiasm. We are satisfied to rely on the record.

We do note, however, that ARSA and Burlington Northern disagree very much with respect to the question whether the Mediation Board has "repudiated" Burlington Northern's position; or whether instead the Board's dismissal of another organization's petition for certification as the representative of one of the groups ARSA claims to represent—the former Great Northern technicians—simply reflects the Board's view that "craft or class" representational units must be carrier-wide in scope. The latter explanation of the Board's actions is the only one that makes any sense to us, and ARSA suggests no other explanation for those actions. In any event, the Mediation Board is a respondent. Therefore, there is no reason why either the Court or the other parties should be required to speculate about the nature

of its determinations. The Solicitor General can readily file a response on its behalf that makes its position plain.[2]

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH J. MOORE, JR.
FRANKLIN D. KRAMER
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
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Washington, D. C. 20005

March 21, 1975

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[2] We note also that ARSA claims that the Interstate Commerce Commission required the merging railroads to enter into agreements recognizing ARSA as the collective bargaining representative after the merger of the groups ARSA claims to represent. (Br. Opp. 7, 15.) There is no need to guess about the Commission's position either, because that too can be ascertained by the Solicitor General. We think the notion that the Commission involved itself with representational issues will come as a complete surprise to the Commission, which affords identical protection to both represented and unrepresented employees and has never inquired into representation. See Pet. 48a-49a; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 347 I.C.C. 536, 548-549 (1974).

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-896

BURLINGTON NORTHERN, INC., PETITIONER

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This Memorandum is submitted in accordance with the Court's April 3, 1975 request, on behalf of the federal respondents, the National Mediation Board ("NMB") and its named members. When the case was before the court of appeals, the federal respondents advised that court that they had no interest in the issues raised on appeal, and consequently did not participate in the case. Petitioner seeks review of the court of appeals' ruling that an Employees Merger Protection Agreement, to which petitioner and respondent labor organization were signatories, was not inconsistent with the Railway Labor Act.

573-785—75——1

1. Petitioner Burlington Northern, Inc., was formed in March, 1970, with the approval of the Interstate Commerce Commission by the merger of the Chicago, Burlington & Quincy Railroad ("CB&Q"), the Great Northern Railway, the Northern Pacific Railway and the Pacific Coast Railroad (Pet. App. 13a). Prior to the merger and with National Mediation Board certification, respondent American Railway Supervisors Association ("ARSA") represented the mechanical supervisors on the CB&Q, and the technicians of the Great Northern. An Employees Merger Protection Agreement, executed by the Burlington Northern, its component lines, and the labor organizations, including ARSA, bound the Burlington Northern to the bargaining agreements of its components that were in effect at the time of consummation of the merger "subject to changes in accordance with the provisions of the Railway Labor Act" (Pet. App. 28a). Section 9 of that Agreement allowed the labor organizations and the Burlington Northern to refer disputes or controversies arising under the Agreement to arbitration (Pet. App. 29a).

Subsequent to the merger, Burlington Northern refused to recognize and treat ARSA as the designated representative of the mechanical supervisors formerly employed by CB&Q and the technicians formerly employed by the Great Northern, on the ground that ARSA lacked the allegiance of a majority of any craft or class of employees of Burlington Northern, the successor company (Pet. App. 28a). ARSA served notice of its intent to refer the dispute to arbitration, and the Burlington Northern brought

suit seeking to enjoin the arbitration and also seeking a declaration confirming the company's actions (Pet. App. 31a). ARSA counterclaimed to compel arbitration and for damages (*ibid.*) The district court dismissed the complaint and counterclaim, holding that it was without jurisdiction to decide what is considered a labor representation issue within the exclusive jurisdiction of the National Mediation Board. *Burlington Northern, Inc.* v. *American Ry. Sup. Ass'n,* 350 F. Supp. 897, 904 (N.D. Ill.) (Pet. App. 25a–38a); 359 F. Supp. 1047, 1049–1050 (N.D Ill.) (Pet. App. 39a–44a).

On appeal, the court of appeals affirmed the dismissal of the complaint and reversed the dismissal of the counterclaim (503 F. 2d 58; Pet. App. 11a–21a). The court of appeals reasoned (Pet. App. 17a):

> In our view, the dispute before us is not one under 45 U.S.C. § 152 Ninth, because no employee or other union has challenged ARSA's certification. The cases cited by the District Court in support of its holding all involve representation disputes between unions or employee groups under 45 U.S.C. § 152 Ninth. *Burlington Northern, Inc.* v. *American Ry. Sup'rs Ass'n, supra,* 350 F. Supp. at 901, n. 8 and 904. The issue before the court in this case, the effect of the pre-merger agreement between the two parties to this action, is a common-law contract determination within the province of the federal courts and is not reserved to the exclusive jurisdiction of the NMB.

Turning to the merits, the court of appeals held that the National Mediation Board's practice of re-

quiring carrier-wide representation of crafts or classes in the context of proceedings under the Railway Labor Act, 45 U.S.C. 152 Fourth and Ninth, did not affect the validity of the Merger Protection Agreement, nor prevent ARSA from representing after the merger the mechanical supervisors and technicians employed by the component railways before the merger (Pet. App. 17a–18a). Accordingly, the court of appeals reversed and remanded the dismissal of the counterclaim with directions that the Burlington Northern be ordered to arbitrate its disagreement with ARSA, according to the terms of the Employees Merger Protection Agreement.

2. The issue in this case is whether Burlington Northern may be required under the Employees Merger Protection Agreement to recognize and bargain with the ARSA. The two relevant questions in terms of the interest of the National Mediation Board are: (a) whether the issue in the case is one for Board determination and (b) whether, regardless of who determines the issue, the asserted obligation to bargain is inconsistent with the Railway Labor Act.

a. The National Mediation Board has authority under 45 U.S.C. 152 Ninth to certify the representatives of any craft or class of employees on a system-wide basis when "any dispute shall arise among a carriers' employees as to who are the representatives of such employees * * *." The issue in this case is not such a dispute, and neither Burlington Northern nor the ARSA suggest that it is. There is therefore no issue for Board determination and the Board has no

jurisdiction over the parties' dispute concerning the enforceability of their private agreement.

b. Burlington Northern's contention is not that the dispute is one for Board determination, but more basically that—regardless of the proper forum for resolving the issue—the Employees Merger Protection Agreement is inconsistent with the Railway Labor Act. In the view of the National Mediation Board, however, nothing in the Railway Labor Act prohibits a carrier from entering into a voluntary agreement to recognize a collective bargaining representative of a class or craft that is not system-wide, even though there has not been a National Mediation Board certification of a craft or class representative.[1] The Board disagrees with Burlington Northern's contention (Pet.

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[1] There has been no certification by the Board since the merger here. In 1973 the ARSA applied to the Board to determine the representation of mechanical supervisors employed by the Burlington Northern on a system-wide basis. However, the Board found no basis for certification because a majority of the eligible mechanical engineers chose not to participate in the ensuing representation election (Pet. App. 50a–51a). The ARSA's failure to gain certification did not affect any obligation Burlington Northern may have under the employees' protection agreement to bargain with the ARSA as the representative of the mechanical supervisors of the merged CB&Q rail line.

Further, the Board's dismissal on June 3, 1970 of a petition by the Great Northern Railway Company Technical Employees Association to represent the Great Northern technicians as moot, because the Great Northern had ceased to exist after the merger (Pet. App. 52a–53a), did not signify that the merger terminated ARSA's status as the certified representative of the technicians. The Board's Executive Secretary so stated on two occasions prior to the institution of this action, as the court of appeals noted (Pet. App. 10a).

23–25) that the merger protection agreement is invalid as inconsistent with the Railway Labor Act.

Switchmen's Union v. *National Mediation Board*, 135 F. 2d 785 (C.A.D.C.), reversed on jurisdictional grounds, 320 U.S. 297, on which petitioner relies (Pet. 21–33), is not in conflict with the court of appeals decision here, as the court recognized when it stated (Pet. App. 19a):

> The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act[2] does not automatically render applicable the NMB's policy determination under the act that a class or craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect. Compare *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 792 (D.C. Cir. 1943), *rev'd on other grounds*, 320 U.S. 297 (1943).

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[2] Section 8 of the Employees Merger Protection Agreement provides: "The New Company [Burlington Northern] will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, *subject to changes in accordance with the provisions of the Railway Labor Act*, as amended, in the same manner and to the same extent as if the New Company had been a party thereto." (Pet App. 93a; emphasis supplied.)

Since *Switchmen's Union* involved a representational dispute rather than, as in the present case, the enforcement of a voluntarily undertaken obligation to recognize a pre-existing bargaining agreement, it is inapposite here.

In sum, it is the view of the National Mediation Board that the case was correctly decided by the court of appeals and presents no issue requiring determination by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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IN THE

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THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, an Agency of the United States of America; and GEORGE S. IVES, DAVID H. STOWE, and PETER C. BENEDICT, Members of the National Mediation Board,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY TO FEDERAL RESPONDENTS' MEMORANDUM IN OPPOSITION

As the National Mediation Board ("NMB") recognizes (Fed. Resp. Mem. 5), the question presented is whether an agreement between a railroad and a union can give the union the right to be the collective bargaining representative of a group of employees that is not a carrier-wide craft or class, notwithstanding the provisions of

Section 2 Fourth of the Railway Labor Act prescribing "craft or class" representational units, and the provisions of Section 2 Eighth of the Act outlawing agreements that are inconsistent with Section 2 Fourth.

The NMB asserts that there is no conflict between the holding below that an agreement can give a union such a right and the contrary decision of the District of Columbia Circuit in the *Switchmen's Union* case,[1] because *Switchmen's Union* allegedly involved a "representational dispute" under Section 2 Ninth of the Railway Labor Act, rather than obligations arising from an agreement, governed by Section 2 Fourth, under which a union claims the right to represent a group that is not a system-wide craft or class (Fed. Resp. Mem. 5, 7).

The cases cannot be distinguished on that ground, as we show below. Moreover, the position taken by the NMB underscores the importance of the case. The NMB asserts that an agreement between a railroad and a union can give the union the right to represent a group of employees that is not a carrier-wide craft or class, but it also reaffirms its refusal to entertain petitions by members of such a group to change their representation (Fed. Resp. Mem. 5, n. 1). Thus, the position taken by the NMB deprives the majority of employees in the group of *any* way in which to change their representation, regardless of their wishes.

1. The NMB's position is erroneous.

At the outset, the NMB's position, agreeing with that of the American Railway Supervisors Association ("ARSA") and the court below, that the pre-merger agreement here could give ARSA the right to represent a group of employees that is not a carrier-wide craft or

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[1] *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785 (D.C. Cir. 1943), *rev'd for lack of jurisdiction*, 320 U.S. 297 (1943).

class (Fed. Resp. Mem. 7) is erroneous as a matter of law. As the Court is aware, ARSA was certified by the NMB as the representative of the Great Northern technicians many years before the Burlington Northern merger of the Great Northern and four other railroads on which ARSA did not represent technicians (Pet. 13a, 14a). At the time of the merger, however, only a quarter of the Great Northern technicians still belonged to ARSA, and another organization (the Great Northern Railway Company Technical Employees Association) claimed the support of a majority of the members of that group and had petitioned the NMB for certification as its representative (Pet. 52a; J.A. 100-102). After the merger the NMB dismissed the application of the GNRCTEA, without determining the preference of a majority of the group, on the ground that the dispute as to the representation of the group was moot because "the Great Northern had ceased to exist after the merger." (Fed. Resp. Mem. 5 n. 1; Pet. 53a.) Nevertheless, ARSA claims that a pre-merger agreement between the railroads and ARSA gives it the right to continue to represent the former Great Northern technicians, notwithstanding the merger; and the NMB has now endorsed the claim that such an agreement would be valid. Thus, if the NMB and the ARSA were correct, the employees in that group would be locked into representation by ARSA. The pre-merger agreement between the railroads and the union allegedly gives ARSA the right to represent the group; and there is no way for the employees in the group to change that representation, because the NMB has reaffirmed its refusal to entertain a petition for certification of a different representative for the group. Not only that, but the NMB now asserts that a vote against representation by ARSA on a system-wide craft or class basis did not dislodge it as the representative of the smaller groups it insists it represents (Pet. 11; Fed. Resp. Mem. 5 n. 1). In short, if the NMB

were correct, representation would be determined in this case not by the preference of a majority of the employees in the group without employer interference, but by an agreement between the employer and a union without regard to the employees' wishes.[2]

Such a result would be plainly inconsistent with the Railway Labor Act. Under Section 2 Fourth of the Act, a majority of the craft or class of *employees* determines representation;[3] under Sections 2 Third and 2 Fourth the *employer* cannot lawfully interfere with the exercise of that right;[4] under Section 2 Eighth agreements by an

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[2] In our reply brief (pp. 3-4) and also in letters to the Solicitor General and the General Counsel of the NMB, we urged the NMB to state the basis for its determination that the disappearance of the Great Northern "mooted" the dispute between ARSA and the GNRCTEA over the representation of the former Great Northern technicians even though ARSA continues to claim the right to represent that group and the GNRCTEA has never withdrawn its conflicting claim that it has the support of a majority of the members of the group. As we said in our reply brief, we believe that ruling simply reflected the Board's long-held view, stated in the *Switchmen's Union* case (Pet. 68a-78a), that "craft or class" representational units, for purposes of Section 2 Fourth of the Act, are carrier-wide in scope. No other explanation of the ruling makes any sense or has ever been suggested either by the NMB or by ARSA. Nevertheless, in the brief filed on behalf of the NMB at the request of the Court, the NMB simply reasserted the conclusion that the disappearance of the *railroad* mooted the controversy over the representation of the group of *employees* the two organizations continued to claim the right to represent, but gave no explanation or basis for that conclusion. (Fed. Resp. Mem. 5 n. 1). This litigation should not be treated as a guessing game. There is no reason why either the Mediation Board or the Solicitor General should be so reluctant to disclose the basis for the Board's position in terms that can be understood.

[3] "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act . . . ." 45 U.S.C. § 152 Fourth.

[4] "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or

employer that interfere with that right or are inconsistent with Section 2 Fourth are invalid;[5] and under Section 2 Tenth such interference is a crime.[6]

2. There is a conflict among the circuits.

The NMB's contention that the court of appeals' decision in the *Switchmen's Union* case does not conflict with the decision below (Fed. Resp. Mem. 6, 7) is equally erroneous. In that case the District of Columbia Circuit, following the clear language of the Act, held that Section 2 Fourth prescribes system-wide "craft or class" representational units; and and it therefore rejected a claim by a union that pre-consolidation agreements between it and a railroad could give the union the continuing right, after a railroad consolidation, to represent a group that was no longer a system-wide craft or class. That decision cannot be distinguished here.

In the *Switchmen's Union* case the Switchmen's Union claimed, just as ARSA does here, that agreements be-

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coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives . . . ." 45 U.S.C. § 152 Third. ". . . [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . ." 45 U.S.C. § 152 Fourth.

[5] ". . . The provisions of [Sections 2 Third and Fourth of this Act, inter alia] are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them." 45 U.S.C. § 152 Eighth.

[6] "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of [Sections 2 Third, Fourth, and Eighth of the Act, inter alia] shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply . . . shall constitute a separate offense . . . ." 45 U.S.C. § 152 Tenth.

tween it and certain railroad parties to a railroad consolidation gave the union the right, after the consolidation, to continue to represent groups it had represented before, although those groups were no longer system-wide crafts or classes. Thus, the Court of Appeals stated:

> "The remaining question concerns the propriety of the Board's finding that all the yardmen employed by the [consolidated New York Central Railroad Company] constitute a single class or craft. The issue is whether, when the employees of a single craft or class have organized, bargained, and made contracts with their employer by groups or divisions, the Board is compelled, upon a proper invocation of its services, to destroy these groupings by forcing the same into a single bargaining unit. Appellants [the Switchmen's Union representatives] admit that, were there no separate existing contracts as here, the action of the Board in unifying the Railroad Company might be proper. . . ." 135 F.2d at 792.[7]

The Court of Appeals rejected the union's claim that pre-consolidation agreements could give the union the right to represent less than a system-wide craft or class on the consolidated railroad as a whole, basing its holding squarely on Section 2 Fourth of the Act, the result

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[7] The contractual provision on which ARSA bases its representation claims said *only* that the merged railroad would assume pre-merger agreements as to pay and working conditions "subject to changes in accordance with the provisions of the Railway Labor Act" (Pet. 28a)—a provision with which Burlington Northern believes it has complied because the only changes it has made in pay and working conditions have been made in accordance with the Act as the railroad understands its obligations thereunder—whereas the opinion in the *Switchmen's Union* case does not indicate the terms of the agreement provisions on which the Switchmen's Union relied. The point here, however, is that the Switchmen's Union claimed, just as ARSA does here, that pre-merger agreements gave it the right to continue to represent a group that was not a system-wide craft or class on the merged railroad as a whole.

Burlington Northern advocates here. The Court of Appeals stated:

> ". . . We believe appellants come close to admitting themselves into a losing position. The Act plainly provides [in Section 2 Fourth] that the *majority* of any craft or class shall determine *the representative* (not representatives) of the craft or class for the purposes of the Act. Appellants cannot complain of interference with their contracts if the provision is a lawful exercise of Congressional authority. Their contracts were necessarily made subject to that authority.
>
> ". . . It is . . . clearly stated [in Section 2 Fourth] that not any group, part or division of a craft or class is entitled to a representative of its own choosing, but that only the 'majority of any craft or class of employees' may do so. Appellants have cited cases which hold that Congress intended employees to be given the right to retain the crafts or classes . . . established by mutual agreement between employee and carrier.[8] It is sufficient, however, to say that these cases were concerned with disputes as to the craft or class to which the nature of an employee's work entitled him to belong, and not with the area which was to be considered the compass of that craft or class. . . .
>
> "We . . . deny that Congress intended any geographical or divisional connotation to be given to the term 'craft or class'; it was intended only in the occupational or functional sense and not in the fractional, divisional, or regional sense." 135 F.2d at 792-793 (emphasis in original).

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[8] Those cases included *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F.2d 780 (D.C. Cir., 1943); *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F.2d 757 (D.C. Cir., 1936); *Brotherhood of Clerks* v. *Nashville, C. & St. L. R. Co.*, 94 F.2d 97 (6th Cir., 1937).

The court of appeals' ruling affirmed the NMB's identical ruling in the case, which likewise was based squarely on Section 2 Fourth (Pet. 76a-77a).

The court of appeals and the NMB both based their interpretation of Section 2 Fourth on legislative history that demonstrated (a) that Congress intended the "craft or class" representational units prescribed by Section 2 Fourth to be system-wide in scope, and (b) that Congress did not intend to permit agreements between railroads and unions to override the statutory provision for system-wide "craft or class" representational units. Thus, as noted in our petition (Pet. 20), the court stated that during the congressional committee hearings on the Act the railroads' principal representative

> "opposed the majority rule provisions because he apparently thought that the craft or class unit was to be carrier wide. . . . He urged, but was unable to persuade, the Interstate and Foreign Commerce Committee of the House to add the following proviso . . . : 'Provided, that only each class or craft *embraced in any existing agreement* shall be the employees to be considered to determine the majority of such employees for the purposes of representation.'" 135 F.2d at 795 (emphasis in original).[9]

Thus, the decision below and the decision in the *Switchmen's Union* case are directly in conflict. In *Switchmen's Union* the court held that Section 2 Fourth prescribes system-wide craft or class representational units, and it

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[9] So too, the Court of Appeals pointed out that during the committee hearings the principal author of the Act, Joseph B. Eastman —in response to the question whether under the Act the employees in a particular shop could get together and bargain with their employer—explained that the term "craft or class" would not refer to "those that did work in a particular shop, but it would be all of the employees of the carrier, no matter in what shop they were located, who did that particular kind of work . . . . for that particular employer." 135 F.2d, at 795. The full quotation is set out in our petition, at 21.

therefore rejected a claim by a union that an agreement between it and a merging railroad gave it the right to represent a group of the railroad's employees after the merger although the group did not constitute a system-wide craft or class on the merged railroad as a whole. The court below held, however, that an agreement could give ARSA just such a right.

To be sure, in the *Switchmen's Union* case the court held further that *since* Section 2 Fourth prescribes system-wide craft or class representational units, the NMB lacks the power under Section 2 Ninth of the Act[10] to certify representatives for groups that are not system-wide craft or class units. The NMB now claims that *Switchmen's Union* is therefore "inapposite" because the instant case does not involve a "representational dispute" under Section 2 Ninth. (Fed. Resp. Mem. 7.) But even a cursory reading of *Switchmen's Union* shows that the decision turned on the interpretation of Section 2 Fourth, not Section 2 Ninth. The issue there—and here—was the scope of the representational unit. That is prescribed by Section 2 Fourth and does not depend on the existence of certification proceedings under Section 2 Ninth. On the contrary, the rights and obligations prescribed by Section 2 Fourth are unconditional. As stated above, Section 2 Fourth provides:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class

[10] Section 2 Ninth provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier . . . ." 45 U.S.C. § 152 Ninth.

> of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . . [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . ."

Moreover, the NMB's claim that the *Switchmen's Union* decision is "inapposite" because no employee group has challenged ARSA's representational claims under Section 2 Ninth is irreconcilable with the NMB's dismissal of such a challenge by the GNRCTEA on the ground that the issue as to the representation of the former Great Northern technicians ARSA claims the right to represent is now "moot" because of the merger. As we have said, that conclusion can be justified only by the very proposition for which the *Switchmen's Union* decision stands—that after a merger employee groups on separate merging railroads are not proper representational units under Section 2 Fourth because they are no longer system-wide craft or class units.[11]

3. The question presented is important.

It is genuinely important for this Court to decide the question presented. The NMB's position locks employees into representation allegedly agreed to by an employer

[11] The NMB also indicates that it does not agree that the merger protection agreement could not and did not override inconsistent representation provisions in the Railway Labor Act (Fed. Resp. Mem. 5-6), but it does not purport to state the ICC's view regarding that issue. There was no discussion of representation in the ICC decision approving the merger (Pet. 45a-49a), and, as we said in our reply brief, the notion that the Commission involved itself with representational issues will come as a surprise to the Commission, which affords identical protection in railroad mergers to both represented and unrepresented employees without inquiring into representation. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 347 I.C.C. 536, 548-549 (1974). In any event, the question whether a merger protection agreement can override the representation provisions of the Railway Labor Act is itself a question that warrants review by this Court for reasons stated in our petition (Pet. 23-25).

and a union and presents issues of equal importance for railroads. Following the NMB's dismissal of the GNRCTEA application, there was no way for the Burlington Northern to proceed without risking a charge that it had interfered with its employees' rights under Section 2 Fourth. If it had continued to treat ARSA as the representative of the Great Northern technicians in the face of the NMB determination that the dispute between ARSA and the GNRCTEA as to the representation of that group had been mooted by the merger, it risked violating the rights of employees who preferred not to be represented by ARSA. On the other hand, if it did not treat ARSA as the representative of the group, it risked violating the rights of the employees who still adhered to ARSA. Unlike ARSA, the railroad could not seek a determination of the question by the NMB, because the NMB will not entertain *employer* applications for a determination of such questions.[12] The railroad proposed in these circumstances to arbitrate the issue, but ARSA refused to arbitrate except on a basis that would pretermit the Railway Labor Act issues (Pet. 9-10). The railroad then instituted this action to obtain a judicial determination, and is now faced with a claim for $1 million in damages for having done so—a claim to which the court below instructed the District Court to give further consideration. If the railroad had chosen instead to accede to ARSA's demands, it is just as likely that it would now be faced with damage claims by those employees who sought to challenge ARSA's right to represent the Great Northern technicians.

This situation is intolerable. The question presented should be decided authoritatively, and the conflicts outlined in the petition for certiorari should be resolved, so

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[12] NMB, 38th Ann. Rep. 30 (1973); *Railway Clerks* v. *Employees Ass'n*, 380 U.S. 650, 666 (1965).

that railroads, employees, and unions will all know exactly where they stand.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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